NEVADA
OPEN MEETING LAW
MANUAL

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Reference is made throughout the manual to OMLO (Open Meeting Law Opinions), which are opinions rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150. OMLO opinions can be found at our website at **ag.state.nv.us** and will be published in the 2000 edition of the Official Opinions of the Attorney General. Additional reference is made to (Op. Nev. Att'y Gen.) Attorney General Opinions, which are opinions rendered pursuant to NRS 228.150 and can be found at our website and in current editions of the Official Opinions of the Attorney General.

Part 1 COMPLIANCE CHECKLIST

This is a checklist to follow when applying the Open Meeting Law. References in brackets are to the NRS and sections of this manual.

Does the Open Meeting Law apply?

_____ Is the entity a public body? [NRS 241.015(3), §§ 3.01-3.09]

_____ Is the activity exempt from the Open Meeting Law? [§§ 4.01-4.06]

_____ Is a meeting going to occur? [NRS 241.015(2), §§ 5.01-5.12]

- _____ Will a quorum of the members of the public body be present? [§ 5.01]
- _____ To deliberate toward a decision or take action? [§ 5.01]
- _____ On any matter over which the public body has supervision, control, jurisdiction, or advisory power? [§ 5.01]

Agenda (*See* Sample Form 1)

_____ Has a clear and complete agenda of all topics to be considered been prepared? [NRS 241.020(2)(c), §§ 6.02, 7.02]

_____ Does the agenda list *all* topics scheduled to be considered during the meeting? [§§ 6.02, 7.02]

_____ Have all the topics been clearly described in the agenda in order to give the public adequate notice? [§§ 6.02, 7.02]

_____ Does the agenda include a designated period for public comments? Does the agenda state that action may not be taken on the matters considered during this period until specifically included on an agenda as an action item? [§§ 6.02, 7.04, 8.04]

_____ Does the agenda describe the items on which action may be taken and clearly denote that action may be taken on those items? [§§ 6.02, 7.01]

_____ Has each closed session been denoted, and if action is to be taken in an open session after the closed session, was it indicated on the agenda? [§§ 7.02, 9.06]

Notice, posting and mailing (*See* Sample Form 1)

_____ Has written notice of the meeting been prepared? [NRS 241.020(2), § 6.01]

_____ Does the notice include:

_____ The time, place, and location of the meeting? [§ 6.02]

_____ An agenda as prepared in accordance with the above standards?

_____ A list of places where the notice was posted? [§ 6.03]

_____ A statement regarding assistance and accommodations for physically handicapped people? [§ 6.02]

_____ Was the written notice [NRS 241.020(3)(a), § 6.03]

_____ Posted at the principal office of the public body (or if there is no principal office, at the building in which the meeting is to be held)? [§ 6.03]

_____ Posted at not less than three other separate, prominent places within the jurisdiction of the public body? [§ 6.03]

_____ Posted no later than 9 a.m. of the third working day before the meeting (don't count day of meeting)? [§§ 6.03, 6.05]

_____ Was the written notice [NRS 241.020(3)(b), § 6.04]

_____ Mailed at no charge to those who requested a copy? [§§ 6.04, 6.07]

_____ Mailed in the same manner in which the notice is required to be mailed to a member of the body? [§ 6.04]

_____ Delivered to the postal service used by the body no later than 9 a.m. of the third working day before the meeting? [§ 6.04]

_____ Have persons who requested notices of the meeting been informed with the first notice sent to them that their request lapses after six months? [NRS 241.020(3)(b), § 6.04]

_____ If a person's character, alleged misconduct, professional competence, or physical or mental health is going to be considered at the meeting, has that person been given written notice of the time and place of the meeting? [NRS 241.033(1), § 6.09]

_____ Was the notice personally delivered to the person at least *five working days* before the meeting *or* sent by certified mail to the last known address of that person at least *21 working days* before the meeting? (Nevada Athletic Commission is exempt from these timing requirements.) [NRS 241.033(1)-(2)]

_____ Did the public body receive proof of service of the notice before holding the meeting? (Nevada Athletic Commission not exempt from this requirement.) [NRS 241.033(1)-(2)]

Agenda support material made available to public

_____ Upon request, have at least one copy of an agenda, a proposed ordinance or regulation that will be discussed at the meeting, and any other supporting material (except confidential material as detailed in the statute) been provided at no charge to each person who so requests? [NRS 241.020(4), §§ 6.06, 6.07]

Emergency Meeting

_____ Is this an emergency meeting? [NRS 241.020(2) and (5), § 6.08]

_____ Were the circumstances giving rise to the meeting unforeseen?

_____ Is immediate action required?

_____ Has the entity documented the emergency?

_____ Has an agenda been prepared limiting the meeting to the emergency item?

_____ Has an attempt been made to give public notice?

_____ While the notice and agenda requirements may be relaxed in an emergency, are other provisions of the Open Meeting Law complied with (e.g., meeting open and public, minutes kept, etc.)?

Closed Session (*See* Sample Form 3)

_____ Is a closed session specifically authorized by statute? [NRS 241.030(1), §§ 9.01-9.07]

_____ Have all the requirements of that statute been met?

_____ If a closed session is being conducted to consider character, misconduct, competence, or physical or mental health of a person under NRS 241.033:

_____ Is the subject person an elected member of a public body? If so, a closed session is not authorized. [NRS 241.031, § 9.04]

_____ Is the closed session to discuss the appointment of any person to public office or as a member of a public body? If so, a closed session is not authorized. [NRS 241.030(3)(e), § 9.03]

_____ Has the subject been notified as provided above? Is there proof of service? [§ 6.09]

_____ If a recording was made of the open session, was a recording also made of the closed session? [§ 9.06]

_____ Was the subject person given a copy of the recording of the closed session if requested? [NRS 241.033(3), § 9.06]

_____ Have minutes been kept of the closed session? [§ 10.02]

_____ Have minutes and recordings of the closed session been retained and disposed of in accordance with NRS 241.035(2)? [§ 10.03]

_____ Was a motion made to go into closed session which specifies the nature of the business to be considered? [NRS 241.030(2), § 9.06]

_____ Was the discussion limited to that specified in the motion? [§ 9.06]

_____ Did the public body go back into open session to take action on the subject discussed (unless otherwise provided in a specific statute)? [§ 9.06]

Meeting open to public; accommodations

_____ Have all persons been permitted to attend? [NRS 241.020, § 8.01]

_____ Was exclusion of witnesses at hearings during the testimony of other witnesses handled properly? [NRS 241.030(3)(c), § 8.06]

_____ Was exclusion of persons who willfully disrupt a meeting to the extent that its orderly conduct is made impractical handled properly? [NRS 241.030(3)(b), § 8.05]

_____ Have members of the public been given an opportunity to speak during the public comment period? [NRS 241.020(2)(c)(3), § 8.04]

_____ Are facilities adequate and open? [§ 8.02]

_____ Have reasonable efforts been made to assist and accommodate physically handicapped persons desiring to attend? [NRS 241.020(1), § 8.03]

_____ If the meeting is by telephone or video conference, can the public hear each member of the body? [§ 5.05]

_____ Have members of the general public been allowed to record public meetings on audiotape or other means of sound reproduction as long as it in no way interferes with the conduct of the meeting? [NRS 241.035(3), § 8.08]

Stick to agenda; emergency agenda items

_____ Have actual discussions and actions at the meeting been limited to only those items on the agenda? [§ 7.03]

_____ If an item has been added to the agenda as an emergency item: [NRS 241.020(2) and (5), § 6.08]

_____ Was it due to an unforeseen circumstance?

_____ Was immediate action required?

_____ Has the emergency been documented in the minutes?

_____ Did the body refrain from taking action on discussion items or public comment items? [NRS 241.020(2)(c)(3), § 7.04]

Recordings

_____ If any recordings were made of the meeting by the body: [NRS 241.035(4), § 10.04]

_____ Have they been made of the closed session as well as open sessions? [NRS 241.035(5), § 9.06]

_____ Have recordings of open sessions been made available to the public within 30 workings days? [NRS 241.035(2)]

_____ Have all recordings been retained for at least 1 year after the adjournment of the meeting? [NRS 241.035(4)(a)]

_____ Have recordings of open sessions been treated as public records in accordance with public records statutes? [NRS 241.035(4)(b)]

_____ Have recordings of closed sessions been made available to the subjects of those sessions, if requested? [NRS 241.033(3)]

Minutes (*See* Sample Form 2)

_____ Have minutes been prepared of both the open and closed sessions? [NRS 241.035(1), § 10.02]

_____ Do they include at a minimum the material required by NRS 241.035(1)? [§ 10.02]

_____ Are minutes of open sessions kept as public records under the public record statutes and NRS 241.035(2)?

_____ Have minutes of open sessions been made available for inspection by the public within 30 working days after the adjournment of the meeting, retained for at least five years, and otherwise treated as provided in NRS 241.035(2)?

_____ Have minutes of closed sessions been made available to the subjects of those sessions if requested? [NRS 241.035(2)]

Noncompliance

_____ Have any areas of noncompliance been corrected? [§§ 11.01, 11.02, 11.03, 11.04]

_____ If litigation is brought to void an action or seek injunctive or declaratory relief, was it brought within the time periods in NRS 241.037(3)? [§ 11.07]

This is the text of chapter 241 of the Nevada Revised Statutes (NRS) as it existed after the 2001 legislative session. As of the date of this Ninth Edition, the new Bills (AB 60, AB 225, and SB 329) had not been placed in chapter 241 of the NRS. However, for reference by the user of this manual, Section 1 of AB 225 has been placed in italics immediately before amended NRS 241.015, just as was done in AB 225. Similarly, Section 1 of SB 329 has been placed in italics for reference immediately before amended NRS 241.015, just as was done in SB 329. New paragraph 4 of NRS 241.020 is set forth in italics as amended by AB 60.

Current copies of the statute should be consulted for legislative changes after 2001 and for current annotations.

CHAPTER 241

MEETINGS OF STATE AND LOCAL AGENCIES

NRS 241.010 Legislative declaration and intent

In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

(Added to NRS by 1960, 25; A 1977, 1099)

(AB 225) Section 1. *Chapter 241 of NRS is hereby amended by adding thereto a new section to read as follows:*

1. A public body shall not consider at a meeting whether to:

(a) Take administrative action against a person; or

(b) Acquire real property owned by a person by the exercise of the power of eminent domain, unless the public body has given written notice to that person of the time and place of the meeting.

2. The written notice required pursuant to subsection 1 must be:

(a) Delivered personally to that person at least 5 working days before the meeting; or

(b) Sent by certified mail to the last known address of that person at least 21 working days before the meeting. A public body must receive proof of service of the written notice provided to a person pursuant to this section before the public body may consider a matter set forth in subsection 1 relating to that person at a meeting.

3. The written notice provided in this section is in addition to the notice of the meeting provided pursuant to NRS 241.020.

(SB 329) Section 1. *Chapter 241 of NRS is hereby amended by adding thereto a new section to read as follows:*

A public body that is required to be composed of elected officials only may not take action by vote unless at least a majority of all the members of the public body vote in favor of the action. For purposes of this section, a public body may not count an abstention as a vote in favor of an action.

NRS 241.015 Definitions

As used in this chapter, unless the context otherwise requires:

1. "Action" means:

(a) A decision made by a majority of the members present during a meeting of a public body;

(b) A commitment or promise made by a majority of the members present during a meeting of a public body; or

(c) If a public body may have a member who is not an elected official, an affirmative vote taken by a majority of the members present during a meeting of ***the*** public body***; or(d) If all the members of a public body must be elected officials, an affirmative vote taken by a majority of all the members of the public body.***

2. "Meeting"***:***

(a) Except as otherwise provided in paragraph (b), means:

(1) The gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

(2) Any series of gatherings of members of a public body at which:

(I) Less than a quorum is present at any individual gathering;

(II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and

(III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.

(b) Does not include a gathering or series of gatherings of members of a public body, as described in paragraph (a), at which a quorum is actually or collectively present:

(1) Which occurs at a social function if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

(2) To receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.

3. Except as otherwise provided in this subsection, "public body" means any administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof and includes an educational foundation as defined in subsection 3 of NRS 388.750 and a university foundation as defined in subsection 3 of NRS 396.405. "Public body" does not include the legislature of the State of Nevada.

4. "Quorum" means a simple majority of the constituent membership of a public body or another proportion established by law.

(Added to NRS by 1977, 1098; A 1993, 2308, 2624; 1995, 716, 1608)

NRS 241.020 Meetings to be open and public; notice of meetings; copy of materials; exceptions

1. Except as otherwise provided by specific statute, all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies. Public officers and employees responsible for these meetings shall make reasonable efforts to assist and accommodate physically handicapped persons desiring to attend.

2. Except in an emergency, written notice of all meetings must be given at least 3 working days before the meeting. The notice must include:

(a) The time, place and location of the meeting.

(b) A list of the locations where the notice has been posted.

(c) An agenda consisting of:

(1) A clear and complete statement of the topics scheduled to be considered during the meeting.

(2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.

(3) A period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2).

3. Minimum public notice is:

(a) Posting a copy of the notice at the principal office of the public body, or if there is no principal office, at the building in which the meeting is to be held, and at not less than three other

separate, prominent places within the jurisdiction of the public body not later than 9 a.m. of the third working day before the meeting; and

(b) Mailing a copy of the notice to any person who has requested notice of the meetings of the body in the same manner in which notice is required to be mailed to a member of the body. A request for notice lapses 6 months after it is made. The public body shall inform the requester of this fact by enclosure with or notation upon the first notice sent. The notice must be delivered to the postal service used by the body not later than 9 a.m. of the third working day before the meeting.

4. ***If a public body maintains a website on the Internet or its successor, the public body shall post notice of each of its meetings on its website unless the public body is unable to do so because of technical problems relating to the operation or maintenance of its website. Notice posted pursuant to this subsection is supplemental to and is not a substitute for the minimum public notice required pursuant to subsection 3. The inability of a public body to post notice of a meeting pursuant to this subsection as a result of technical problems with its website shall not be deemed to be a violation of the provisions of this chapter. (AB 60 effective January 1, 2003.)***

5. Upon any request, a public body shall provide, at no charge, at least one copy of:

(a) An agenda for a public meeting;

(b) A proposed ordinance or regulation which will be discussed at the public meeting; and

(c) Any other supporting material provided to the members of the body for an item on the agenda, except materials:

(1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement;

(2) Pertaining to the closed portion of such a meeting of the public body; or

(3) Declared confidential by law.

6. As used in this section, "emergency" means an unforeseen circumstance which requires immediate action and includes, but is not limited to:

(a) Disasters caused by fire, flood, earthquake or other natural causes; or

(b) Any impairment of the health and safety of the public.

(Added to NRS by 1960, 25; A 1977, 1099, 1109; 1979, 97; 1989, 570; 1991, 785; 1993, 1356, 2636; 1995, 562, 1608)

NRS 241.030 Exceptions to requirement for open and public meetings

1. Except as otherwise provided in NRS 241.031 and 241.033, nothing contained in this chapter prevents a public body from holding a closed meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person.

2. A public body may close a meeting upon a motion which specifies the nature of the business to be considered.

3. This chapter does not:

(a) Apply to judicial proceedings.

(b) Prevent the removal of any person who willfully disrupts a meeting to the extent that its orderly conduct is made impractical.

(c) Prevent the exclusion of witnesses from a public or private meeting during the examination of another witness.

(d) Require that any meeting be closed to the public.

(e) Permit a closed meeting for the discussion of the appointment of any person to public office or as a member of a public body.

4. The exception provided by this section, and electronic communication, must not be used to circumvent the spirit or letter of this chapter in order to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory powers.

(Added to NRS by 1960, 25; A 1977, 1100; 1983, 331; 1993, 2637)

NRS 241.031 Meeting to consider character, misconduct, competence or health of elected member of public body

A public body shall not hold a closed meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of an elected member of a public body.

(Added to NRS by 1993, 2636)

NRS 241.033 Closed meeting to consider character, misconduct, competence or health of person: Written notice to person required; exception; copy of record

1. A public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person unless it has given written notice to that person of the time and place of the meeting. Except as otherwise provided in subsection 2, the written notice must be:

(a) Delivered personally to that person at least 5 working days before the meeting; or

(b) Sent by certified mail to the last known address of that person at least 21 working days before the meeting.

A public body must receive proof of service of the notice required by this subsection before such a meeting may be held.

2. The Nevada Athletic Commission is exempt from the requirements of paragraphs (a) and (b) of subsection 1, but must give written notice of the time and place of the meeting and must receive proof of service of the notice before the meeting may be held.

3. A public body shall provide a copy of any record of a closed meeting prepared pursuant to NRS 241.035, upon the request of any person whose character, alleged misconduct, professional competence, or physical or mental health was considered at the meeting.

(Added to NRS by 1993, 2636)

NRS 241.035 Public meetings: Minutes; aural and visual reproduction

1. Each public body shall keep written minutes of each of its meetings, including:

(a) The date, time and place of the meeting.

(b) Those members of the body who were present and those who were absent.

(c) The substance of all matters proposed, discussed or decided and, at the request of any member, a record of each member's vote on any matter decided by vote.

(d) The substance of remarks made by any member of the general public who addresses the body if he requests that the minutes reflect his remarks or, if he has prepared written remarks, a copy of his prepared remarks if he submits a copy for inclusion.

(e) Any other information which any member of the body requests to be included or reflected in the minutes.

2. Minutes of public meetings are public records. Minutes or audiotape recordings of the meetings must be made available for inspection by the public within 30 working days after the adjournment of the meeting at which taken. The minutes shall be deemed to have permanent

value and must be retained by the public body for at least 5 years. Thereafter, the minutes may be transferred for archival preservation in accordance with NRS 239.080 to 239.125, inclusive. Minutes of meetings closed pursuant to NRS 241.030 become public records when the body determines that the matters discussed no longer require confidentiality and the person whose character, conduct, competence or health was discussed has consented to their disclosure. That person is entitled to a copy of the minutes upon request whether or not they become public records.

3. All or part of any meeting of a public body may be recorded on audiotape or any other means of sound or video reproduction by a member of the general public if it is a public meeting so long as this in no way interferes with the conduct of the meeting.

4. Each public body may record on audiotape or any other means of sound reproduction each of its meetings, whether public or closed. If a meeting is so recorded:

(a) The record must be retained by the public body for at least 1 year after the adjournment of the meeting at which it was recorded.

(b) The record of a public meeting is a public record and must be made available for inspection by the public during the time the record is retained. Any record made pursuant to this subsection must be made available to the attorney general upon request.

5. If a public body elects to record a public meeting pursuant to the provisions of subsection 4, any portion of that meeting which is closed must also be recorded and must be retained and made available for inspection pursuant to the provisions of subsection 2 relating to records of closed meetings. Any record made pursuant to this subsection must be made available to the attorney general upon request.

(Added to NRS by 1977, 1099; A 1989, 571; 1993, 449, 2638)

NRS 241.036 Action taken in violation of chapter void

The action of any public body taken in violation of any provision of this chapter is void.

(Added to NRS by 1983, 1012)

NRS 241.037 Action by attorney general or person denied right conferred by chapter; limitation on actions

1. The attorney general may sue in any court of competent jurisdiction to have an action taken by a public body declared void or for an injunction against any public body or person to require compliance with or prevent violations of the provisions of this chapter. The injunction:

(a) May be issued without proof of actual damage or other irreparable harm sustained by any person.

(b) Does not relieve any person from criminal prosecution for the same violation.

2. Any person denied a right conferred by this chapter may sue in the district court of the district in which the public body ordinarily holds its meetings or in which the plaintiff resides. A suit may seek to have an action taken by the public body declared void, to require compliance with or prevent violations of this chapter or to determine the applicability of this chapter to discussions or decisions of the public body. The court may order payment of reasonable attorney's fees and court costs to a successful plaintiff in a suit brought under this subsection.

3. Any suit brought against a public body pursuant to subsection 1 or 2 to require compliance with the provisions of this chapter must be commenced within 120 days after the action objected to was taken by that public body in violation of this chapter. Any such suit brought to have an action declared void must be commenced within 60 days after the action objected to was taken.

(Added to NRS by 1983, 1012; A 1985, 147)

NRS 241.038 Board of regents to establish requirements for student governments

The board of regents of the University of Nevada shall establish for the student governments within the University and Community College System of Nevada requirements equivalent to those of this chapter and shall provide for their enforcement.

(Added to NRS by 1983, 1013; A 1993, 369)

NRS 241.040 Penalties; members attending meeting in violation of chapter not accomplices; enforcement by attorney general

1. Each member of a public body who attends a meeting of that public body where action is taken in violation of any provision of this chapter, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor.

2. Wrongful exclusion of any person or persons from a meeting is a misdemeanor.

3. A member of a public body who attends a meeting of that public body at which action is taken in violation of this chapter is not the accomplice of any other member so attending.

4. The attorney general shall investigate and prosecute any violation of this chapter.

(Added to NRS by 1960, 26; A 1977, 1100; 1983, 1013)

Part 3 WHAT IS A "PUBLIC BODY" THAT MUST CONDUCT ITS MEETINGS IN COMPLIANCE WITH THE OPEN MEETING LAW?

§ 3.01 General; discussion of statutory definition

NRS 241.015(3) defines a public body as:

> Except as otherwise provided in this subsection, "public body" means any administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof and includes an educational foundation as defined in subsection 3 of NRS 388.750 and a university foundation as defined in subsection 3 of NRS 396.405. "Public body" does not include the legislature of the State of Nevada.

The combined definitions of "meeting," "action," and "quorum" in NRS 241.015(1), (2), and (4) indicate the type of body covered by the Open Meeting Law is a *collegial* body. Those definitions repeatedly use the plural word "members" and also the words "quorum" and "simple majority," which indicate the body must be comprised of more than one person and those persons share voting powers. The definitions further indicate the Open Meeting Law concerns itself with meetings, gatherings, decisions, and actions obtained through a collective consensus of the members, all of which indicates a fundamental assumption the Open Meeting Law concerns itself only with collegial bodies. *See* A. Schwing, OPEN MEETING LAWS, § 6.32, (1994) ("The collegial character of the public bodies subject to open meeting requirements is a fundamental assumption underlying the laws").

Further, the body must be a *public* body, and the definition in NRS 241.015(3) indicates that a public body:

- is an "administrative, advisory, executive or legislative body of the state or a local government," which means that the body must (1) owe its existence to and have some relationship with a state or local government, (2) be organized to act in an administrative, advisory, executive or legislative capacity, and (3) must perform a government function; and

- expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue.

In a letter opinion, the Office of the Attorney General opined that when determining if a body is supported by tax revenues, the term "tax revenues" should be construed in its broadest possible sense to include not only those items traditionally thought of as taxes but also the license fees paid to various professional licensing boards pursuant to state law. *See* Attorney General letter opinion addressed to Mr. Arne R. Purhonen, Nevada State Board of Architecture, dated September 1, 1977.

For a discussion of some of the above principles, *see* OMLO 99-05 (January 12, 1999) where the Office of the Attorney General opined that the Economic Development Authority of Western Nevada is not a public body as defined by NRS 241.015(3).

With these fundamentals in mind, the following sections give some specific determinations of which entities are public bodies within the meaning of the Open Meeting Law.

§ 3.02 Bodies headed by one person, Governor not a public body

Following the principle that a "public body" must be a multi-member entity, the Office of the Attorney General opined that the Open Meeting Law does not apply to the Governor when he is acting in his official executive capacity because the Governor is not a multi-member body. *See* Op. Nev. Att'y Gen. No. 241 (August 24, 1961).

Likewise, an executive officer of a board or commission who carries out the directives, orders and policies of a board or commission in day-to-day administration of an agency of government is not considered the alter ego of the board or commission so as to require him to comply with the Open Meeting Law. *Bennett v. Warden*, 333 So. 2d 97 (Fla. Dist. Ct. App. 1976) (meetings between college president and his advisors or staff personnel not covered).

Along this line, the Office of the Attorney General held that staff meetings to advise a city manager who, in turn, arrives at his own decision and recommendation on an insurance claim were not within the ambit of the Open Meeting Law. *See* Op. Nev. Att'y Gen. No. 79-5 (February 23, 1979).

§ 3.03 Agency staff

The Open Meeting Law does not usually apply to the typical internal agency staff meetings where staff members make individual reports and recommendations to a superior, where the technical requirements of a quorum do not apply, and where decisions are not reached by a vote or consensus.

In *People ex rel. Cooper v. Carlson*, 328 N.E.2d 675 (Ill. App. Ct. 1975), a newspaper publisher sued to gain admittance to a meeting between a land developer and the staff of a county development department to discuss a proposed new development. The court held that Illinois' open meeting law (whose definition of "public body" is similar to Nevada's) did not apply to technical staff meetings of the county development department

directors, whose discussions led to recommendations being made to the county development committee, where no motions or resolutions were presented during such staff meetings, there was no statute, ordinance or resolution by the county board or by the county development committee appointing the technical staff as a public body or subsidiary body, and where such periodic meetings or conferences of the staff were intended to provide more efficient service to the county development committee and to the county board whose meetings were held in compliance with the Open Meeting Law.

However, when a public body delegates *de facto* authority to a staff committee to act on its behalf in the formulation, preparation, and promulgation of plans or policies, the staff committee stands in the shoes of the public body and the Open Meeting Law may apply to the staff meetings. *See News-Press Publishing Company v. Carlson*, 410 So. 2d 546 (Fla. Dist. Ct. App. 1982). (When governing authority of a hospital district delegated responsibility of preparation of a proposed budget to an internal budget committee, the open meeting law applied to the committee, even though it consisted of staff personnel.) Following the above principles, the Office of the Attorney General opined that the Open Meeting Law did not apply to internal staff meetings of an executive agency or interagency staff meetings except where a public body delegates policy formulation or planning functions to a staff committee and these policies or plans are the subject of foreseeable action by the public body. *See* Letter Opinion to Mr. William A. Molini dated February 11, 1985.

§ 3.04 Committees, subcommittees; advisory bodies

NRS 241.015(3) specifically includes committees, subcommittees, or subsidiaries thereof within the definition of a "public body." A committee or subcommittee is covered by the law whenever a quorum of the committee or subcommittee gathers to deliberate or make a decision. *Lewiston Daily Sun, Inc. v. City of Auburn*, 544 A.2d 335 (Me. 1988); *Arkansas Gazette Co. v. Pickens*, 522 S.W.2d 350 (Ark. 1975).

The Open Meeting Law does not define what a "committee, subcommittee or subsidiary thereof" is, so counsel for the public body should be consulted for a determination of whether the Open Meeting Law extends to a particular group of persons. Following the principles of the cases cited above and in § 3.03, to the extent that a group is appointed by a public body and is given the task of making decisions for or recommendations to the public body, the group would be governed by the Open Meeting Law.

NRS 241.015(3) specifically includes within the definition of public body an ". . . advisory . . . body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue. . . ."

For additional guidance, *see* OMLO 98-03 (July 7, 1998), where the Office of the Attorney General opined that a subcommittee informally appointed by the president of a school board was a public body as defined in NRS 241.015(3) where, even though the

subcommittee was not formally appointed, its members shared equal voting power, formed a consensus to speak to the school board with one voice, and the school board knew of its existence and treated it as a board subcommittee, and OMLO 98-04 (July 7, 1998) where the Office of the Attorney General opined that two school board members, while self-appointed and initially acting as individuals, became a public body as defined in NRS 241.015(3) when the school board began recognizing them as a subcommittee and encouraging them to meet with staff to formulate a school safety proposal to be presented to the board, after which they met as a collegial body with staff to form a proposal which was formally presented to the board in the name of the "School Safety Subcommittee." The Office of the Attorney General opined that formality in appointment is not the sole dispositive factor in determining what constitutes a public body under the Open Meeting Law, and informality in appointment should not be an escape from it; to hold otherwise would encourage circumvention of the Open Meeting Law through the use of unofficial committees.

§ 3.05 Commissions or committees appointed by Legislature

The Legislature is specifically excluded from the Open Meeting Law. NRS 241.015(3).

Since the Legislature, as a whole, is not governed, none of its various committees or subcommittees are governed by the law while the full Legislature is in session.

§ 3.06 Members-elect of public bodies

Although the literal language of the Open Meeting Law appears to limit its application to actual members of a public body, the Office of the Attorney General believes the better view is set forth in *Hough v. Stembridge*, 278 So. 2d 288 (Fla. Dist. Ct. App. 1973), where the court held that members-elect of boards and commissions are within the scope of an open meeting law. Otherwise, members-elect could gather with impunity behind closed doors and make decisions on matters soon to come before them in clear violation of the purpose, intent, and spirit of our Open Meeting Law. Application of the provisions of the statute to members-elect of public bodies is consistent with the liberal interpretation mandated for the Open Meeting Law. *See* OMLO 99-06 (March 19, 1999) and AG File Nos. 01-003, 01-008 (April 12, 2001).

§ 3.07 Specific examples of entities which have been deemed to be public bodies

The following entities have specifically been deemed to be public bodies as indicated.

Nevada Interscholastic Association	*See* Question 7 to the sixth edition of this manual.
Board of Architecture	*See* Attorney General Letter Opinion dated September 1, 1977

Reno City Insurance Committee	Decides on payment of insurance claims up to a certain amount and makes recommendations to the City Council on others. *See* Op. Nev. Att'y Gen. No. 79-5 (February 23, 1979)
Board of Dental Examiners	*See* Attorney General Letter Opinion dated November 20, 1979
Community Development Corporation and the Eureka County Economic Development Council	*See* AG File No. 00-030 (April 12, 2001)

§ 3.08 Specific examples of entities which have been deemed not to be public bodies

Committee to prepare arguments advocating and opposing approval of ballot questions for a city. *See* Op. Nev. Att'y Gen. No. 2000-18 (June 2, 2000). A private, not-for-profit electric utility company. *See* AG File No. 00-055 (March 12, 2001). Non-profit community senior citizen's center. *See* OMLO 99-035 (April 3, 2000). Economic Development Authority of Western Nevada. *See* OMLO 99-05 (January 12, 1999).

§ 3.09 Private, nonprofit organizations

Generally speaking, the Legislature has no right to require private, nonprofit civic organizations to comply with the Open Meeting Law, but where a government body or agency itself establishes such a civic organization, even though it is composed of private citizens, it may well constitute a "public body" under the law. *Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). In Nevada, this would be true if the civic organization is intended to perform any administrative, advisory, executive or legislative function of state or local government and it expends or disburses or is supported in whole or in part by tax revenue, or if it is intended to advise or make recommendations to any other Nevada governmental entity which expends or disburses or is supported in whole or in part by tax revenue. *See* e.g., *Seghers v. Community Advancement, Inc.*, 357 So. 2d 626 (La. Ct. App. 1978); *Raton Public Service Co. v. Hobbes*, 417 P.2d 32 (N.M. 1966). However, the mere receipt of a grant of public money does not by itself transform a private, nonprofit civic organization into a "public body" for purposes of the Open Meeting Law, nor does the membership of a few government officials on the organization's board of directors, *per se*, make the organization a "public body." A private, non-profit corporation is a public body if it is formed by a public body, acts in an administrative, advisory and executive capacity in performing local governmental functions, and is supported in part by tax revenue from the public body. *See* AG File No. 00-030 (April 12, 2001).

Part 4 WHAT ACTIVITIES ARE EXEMPT FROM THE OPEN MEETING LAW?

§ 4.01 General

The opening clause in NRS 241.020(1) provides that the Open Meeting Law applies "except as otherwise provided by specific statute." The word "specific" is an important one. The Nevada Supreme Court is reluctant to imply exceptions to the rule of open meetings. *See McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987). *See also* Op. Nev. Att'y Gen. No. 150 (November 8, 1973).

Some entities are totally exempt from the Open Meeting Law by specific statute, such as the judiciary and the Legislature as explained below.

Some statutes specifically provide that certain activities may be conducted without regard to the Open Meeting Law, while others merely have the effect of allowing certain activities to be closed to the public. The distinction is important because any action taken in violation of the Open Meeting Law is void, which can give rise to great complications. For example, some statutes permit or require "deliberations" of certain matters to be closed to the public, but that does not necessarily imply that actions taken after those deliberations are exempt from the Open Meeting Law.

The distinction is sometimes obfuscated by statutory language that is not as specific as contemplated by NRS 241.020(1). In those cases, interpretation of the statutes should be employed using the standards discussed in Part 12 of this manual.

Below is a discussion of some activities that are exempt from the Open Meeting Law, and some activities that are not.

§ 4.02 Statutory exemptions

The following proceedings are exempt from the Open Meeting Law under the statutes cited. Because the statutes may change after the printing of this manual, be sure to check the statutes and make sure all the conditions or requirements of the statutes are followed.

Should a body choose to conduct any of these proceedings as part of an open meeting, the Office of the Attorney General recommends the proceedings be included on the agenda as an exempt proceeding, but the exemption from the open meeting requirements still applies to the proceeding.

Judicial Proceedings	*See* NRS 241.030(3)(a), and *Goldberg v. Eighth Judicial District Court*, 93 Nev. 614, 572 P.2d 521 (1977). Note that since the definition of "public body" under NRS 241.015(3) does not include a

	judicial body, it appears the Open Meeting Law does not apply to the Judicial Selection Commission and the Commission on Judicial Discipline.
Legislature	The Legislature is excluded from the definition of a "public body" in NRS 241.015(3). *See* Article 4 § 15 of the Nevada Constitution. *See* discussion in § 3.05.
State Ethics Commission	Meetings or hearings to receive information or evidence concerning the propriety of the conduct of any public officer or employee under NRS chapter 281 are exempt under NRS 281.511(10).
Local Ethics	NRS 281.541 provides a specific statutory exception to the Open Meeting Law that allows a local ethics committee to render a confidential opinion to an elected city councilperson. *See* Op. Nev. Att'y Gen. No. 94-10 (May 24, 1994). A local ethics board may not meet in closed session to discuss the past conduct of a public official due to lack of a statutory exception to the open meeting requirements. *See* Op. Nev. Att'y Gen. No. 94-21 (July 29, 1994).
Hearings by school boards to consider expulsion of pupils	*See* NRS 392.467(3), *Davis v. Churchill County School Board*, 616 F. Supp. 1310 (D. Nev. 1985), and OMLO 99-04 (January 11, 1998).
Certain labor negotiations proceedings	The following proceedings conducted under NRS chapter 288 are exempt: (1) any negotiation or informal discussion between a local government employer and an employee organization or employee individuals, whether conducted by the governing body or through a representative or representatives; (2) any meeting of a mediator with either party or both parties to a negotiation; (3) any meeting or investigation conducted by a fact finder; (4) any meeting of the governing body of a local government employer with its management representative or representatives, and (5) deliberations of the board toward a decision on a complaint, appeal or petition for declaratory relief. *See* NRS 288.220.
Medical, Dental Screening Panels	The Open Meeting Law does not apply to any meeting. *See* NRS 41A.029.

§ 4.03 Certain confidential investigative proceedings of the Gaming Control Board and Commission

NRS 463.110(2) holds that all meetings of the Gaming Control Board are open to the public except for investigative hearings that may be conducted in private at the discretion of the board or hearing examiner. NRS 463.110(4) holds that investigative hearings of the board or hearing officer may be conducted without notice.

Also, the Office of the Attorney General opined in Op. Nev. Att'y Gen. No. 150 (November 8, 1973) that certain investigative proceedings involving the Gaming Commission receiving information that is confidential by law may be exempt from the Open Meeting Law, at least up to the point where the proceeding moves into deliberations or taking action. *See* Op. Nev. Att'y Gen. No. 150 (November 8, 1973) *Cf. Marston v. Gainesville Sun Publishing Co.*, 341 So. 2d 783 (Fla. Dist. Ct. App. 1976).

§ 4.04 Quasi-judicial functions

Nevada law is not settled on this issue, but the Office of the Attorney General believes that absent a specific statute to the contrary, public bodies performing quasi-judicial activities are not *per se* exempt from the Open Meeting Law. *See* OMLO 98-02 (March 16, 1998). Under the Open Meeting Law, a public body performing a quasi-judicial function may deliberate in private with respect to evidence received in a public evidentiary hearing but the deliberations must be limited to consideration of the character, alleged misconduct, professional competence, or physical or mental health of a person. However, voting on the matter must be done in an open session. *See* § 9.04 of this manual. Whether closed sessions may be held to deliberate on other issues depends on the statutes governing the quasi-judicial activities.

Courts in other jurisdictions have reached a similar conclusion, even in the absence of language such as that found in NRS 241.030(1). For instance, in *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, 364 A.2d 610 (D.C. 1976), the court stated:

> We note preliminarily that the decision made here in executive session was a quasi-judicial action in which, historically, only the voting members play a role. The quasi-judicial function of an administrative agency differs completely from the nature of its other activities. The personal and property rights of the parties, at issue in such proceedings, can only be protected, under the American system, in a judicial atmosphere that assures freedom of expression to each deciding official and encourages a free discussion and exchange of views which is so essential to frank and impartial deliberation.

> This court recently interpreted the sunshine act in *Jordan v. District of Columbia*, 362 A.2d 114 (D.C. 1976). We held there that to open all meetings to the public "would effectively prevent the frank exchange of views in private among members of quasi-judicial agencies in reaching a decision-thus putting them on an entirely different footing from appellate court and juries-to say nothing of federal administrative agencies-where experience has shown that the free flow of discussion unimpeded by the presence or reactions of the parties to the controversy has encouraged fair and just results."

Similarly, in *Einarsen v. City of Wheat Ridge*, 604 P.2d 691 (Colo. Ct. App. 1979), the court concluded that where the city council took all evidence in open meeting, deliberated over the evidence in closed meeting, and returned to open meeting to make its decision, no violation of the Open Meeting Law occurred. *See also Department of Pollution Control v. Career Service Commission*, 320 So. 2d 846 (Fla. Dist. Ct. App. 1975), wherein the court held deliberations of a review board following a public hearing are quasi-judicial in nature (similar to a petit jury) and are not subject to the provisions of the Open Meeting Law, and *Stillwater Savings & Loan Ass'n v. Oklahoma Savings & Loan Board*, 534 P.2d 9 (Okla. 1975), in which the court held the deliberations of a quasi-judicial body were not covered by an Open Meeting Law.

§ 4.05 Attorney-Client conferences possibly exempt

Except for NRS 286.150(2) which relates to PERS, and AB 225, 2001, there is no statute that specifically allows a closed meeting with counsel to discuss litigation. In *McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987), the Nevada Supreme Court expressly declined to find an implied exception to our Open Meeting Law for attorney-client meetings based on the nature and content of the statute itself. The court also refused to find that any independent, constitutional, statutory, common law, or public policy consideration supersedes or overcomes the clear language of the statute and permits closed meetings between public bodies and their lawyers. The court rejected the argument that either the testimonial attorney-client privilege or the ethical rule requiring attorney-client confidentiality would be violated by open meetings when an attorney meets with a quorum of the members of a public body. While acknowledging its ruling might cause some measure of frustration or inconvenience in the parties' legal dealings, the court stated:

> The present law merely requires that a quorum of a board, even when attorney-client business is being conducted, must hold open meetings. Although this requirement might create some measure of frustration or inconvenience in the parties' legal dealings, it is certainly not the kind of arrangement that can be said to destroy the relationship and make it impossible for a public body to receive the legal advice necessary to carry out the public business. Nothing whatever precludes an attorney for a public body from conveying

> sensitive information to the members of a public body by confidential memorandum; nor does anything prevent the attorney from discussing sensitive information in private with members of the body, singly or in groups less than a quorum. Any detriment suffered by the public body in this regard must be assumed to have been weighed by the legislature in adopting this legislation. The legislature has made a legitimate policy choice-one in which this court cannot and will not interfere.

This opinion of Nevada's Supreme Court effectively nullifies the conclusion of the federal courts in *Tahoe Regional Planning Agency v. McKay*, 590 F. Supp. 1071 (D. Nev. 1984) *aff'd* 769 F.2d 534 (9th Cir. 1985).

While not addressing the issue in terms of allowing a closed meeting with counsel, the new statute (AB 225, 2001) appears to exempt such meetings from the definition of "meeting," in effect restoring the traditional attorney-client privilege that had been abrogated by the earlier enactment of NRS chapter 241. *See* § 5.11.

See Section 5.03 regarding "social" meetings.

§ 4.06 Student governments

NRS 241.038 requires the Board of Regents of the University of Nevada to establish requirements equivalent to the Open Meeting Law for student governments in the University and Community College System and provide for their enforcement.

Part 5 WHAT GATHERINGS MUST BE CONDUCTED IN COMPLIANCE WITH THE OPEN MEETING LAW?

§ 5.01 General; statutory definitions

As defined in NRS 241.015(2), a meeting is "the gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power." AB 225, 2001, modified the definition to include as a meeting:

> "Any series of gatherings of members of a public body at which:
> (I) Less than a quorum is present at any individual gathering;
> (II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and
> (III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter."

AB 225 excludes from the definition of meeting:

> "[A] gathering or series of gatherings of members of a public body, as described in paragraph (a), at which a quorum is actually or collectively present:
> (1) Which occurs at a social function if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.
> (2) To receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both."

Some of the key words in that definition are:

"gathering" In Op. Nev. Att'y Gen. No. 85-19 (December 17, 1985), the Office of the Attorney General defined "gathering" to mean to bring together, collect, or accumulate and to place in readiness. Accordingly, a "gathering" of members of a public body within the conception of an open meeting would include any method of collecting or accumulating the deliberations or decisions of a quorum of these members.

"quorum" A "quorum" of a public body is defined in NRS 241.015(4) as a simple majority of the constituent membership of a public body or another proportion established by law.

"present" The Office of the Attorney General believes the term "present" means being in view or immediately at hand, being within reach, sight or call, being in a certain place and not elsewhere, ready at need. Presence may be either actual or constructive and a quorum of the membership of a public body is constructively present whenever the attendant acts, circumstances and conduct demonstrate that the members should be deemed by the law as being together for the purpose of conducting the business of the public. Op. Nev. Att'y Gen. No. 85-19 (December 17, 1985).

"deliberate" To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. . . . Deliberation thus connotes not only collective discussion, but also the collective acquisition or the exchange of facts preliminary to the ultimate decision. *See Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 69 Cal. Rptr. 480 (Cal. Ct. App. 1968) discussed in § 5.02 below.

"action" Under NRS 241.015(1), "action" means: (a) a decision made by a majority of the members present during a meeting of a public body; (b) a commitment or promise made by a majority of the members present during a meeting of a public body; (c) if a public body may have a member who is not an elected official, an affirmative vote taken by a majority of the members present during a meeting of the public body; or (d) if all the members of a public body must be elected officials, an affirmative vote taken by a majority of all the members of the public body.

Application of the definitions to common circumstances follows.

§ 5.02 Informal gatherings and discussions

In *Sacramento Newspaper Guild*, all five members of the Sacramento County Board of Supervisors went to a luncheon gathering at the Elks Club with the county counsel, county executive, county director of welfare, and some AFL-CIO labor leaders to discuss a strike of the Social Workers Union against the county. Newspaper reporters were not allowed to sit in on the luncheon, and litigation resulted. The board of supervisors contended that the luncheon was informal and merely involved discussions that were neither deliberations nor actions in violation of California's open meeting law.

The California Court of Appeals disagreed and upheld an injunction against the board, ruling that California's open meeting law extended to informal sessions or conferences designed for discussion of public business. Among other things, the Court observed:

> Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, rather it comprehends both and either.
>
> . . .
>
> To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. . . . Deliberation thus connotes not only collective discussion, but the collective acquisition or the exchange of facts preliminary to the ultimate decision.
>
> . . .
>
> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic, pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry in discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, disposing it to the very evasions it was designed to prevent. Construed in light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of board members designed for the discussion of public business. The Elks Club luncheon . . . was such a meeting.

Id.

There are important objectives to be achieved from requiring the deliberations and actions of public agencies to be open and public. As stated in the article "Access to Government Information in California:"

> The goal in requiring that deliberations take place at meetings that are open and public is that committee members make a conscientious effort to hear viewpoints on each issue so that the community can understand on what their premises are based, add to those premises when necessary, and intelligently evaluate and participate in the process of government.

54 Cal. L. Rev. 1650 (1966).

The Office of the Attorney General agrees with the foregoing and believes that if a majority of the members of a public body should gather, *even informally*, to deliberate toward a decision or to take any action on any matter over which the public body has supervision, control, jurisdiction, or advisory power, it must comply with the Open Meeting Law. *Cf.* Op. Nev. Att'y Gen. No. 241 (August 24, 1961), and Op. Nev. Att'y Gen. No. 380 (January 1, 1967), certain aspects of which were written before the statutory definition of "meeting" was established.

Under some city charters, the mayor is not a member of the city council, and the mayor's powers are usually limited to a veto or casting a tie-breaking vote. In such cases, the presence of the mayor is not counted in determining the presence of a quorum of the council. *See* Op. Nev. Att'y Gen. No. 2001-13 (June 1, 2001).

§ 5.03 Social gatherings

Nothing in the Open Meeting Law purports to regulate or restrict the attendance of members of public bodies at purely social functions. A social function would only be reached under the law if it is scheduled or designed, at least in part, for the purpose of having a majority of the members of the public body deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction, or advisory power. As described by the California Court of Appeals in *Sacramento Newspaper Guild, supra*:

> There is a spectrum of gatherings of public agencies that can be called a meeting, ranging from formal convocations to transact business to chance encounters where business is discussed. However, neither of these two extremes is an acceptable definition of the statutory word "meeting." Requiring all discussions between members to be open and public would preclude normal living and working by officials. On the other hand, permitting secrecy, unless there is a formal convocation of a body, invites evasion. Although one might hypothesize quasi-social occasions whose characterization as a meeting would be debatable, the difference between a social occasion or one arranged for pursuit of the public's business will usually be quite apparent.

The definition of meeting now explicitly excludes a gathering or series of gatherings of members of a public body at which a quorum is actually or collectively present which occurs at a social function, if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power. (AB 225)

§ 5.04 Seminars, conferences, conventions

When a majority of the members of a public body attend a state or national seminar, conference, or convention to hear speakers on general subjects of interest to public officials or to participate in workshops with their counterparts from around the state or nation, it usually may be assumed they are there for the purpose of general education and social interaction and not to conduct meetings to deliberate toward a decision or to take action on any matter over which their public body has supervision, control, jurisdiction, or advisory power, even if presentations at the seminar touch on subjects within the ambit of the public body's jurisdiction or advisory power.

But should the gathering have the purpose of or in fact exhibit the characteristics of a "meeting" as defined in our law, then the provisions of the Open Meeting Law apply.

§ 5.05 Telephone conferences

Nothing in the Open Meeting Law appears to prohibit a quorum of the members of a public body from deliberating toward a decision or taking action on public business via a telephone conference call in which they are simultaneously linked to one another telephonically. However, since this is a "meeting," the notice requirements of the Open Meeting Law must be complied with and the public must have an opportunity to listen to the discussions and votes by all the members such as through a speaker phone or other device. This may be accomplished by including in the meeting notice the location and address of a place where members of the public may appear and listen to the meeting over a telephone speaker device.

Although a telephone conference may be a lawful method of conducting the public's business, it should never be used as a subterfuge to avoid compliance with the Open Meeting Law and its stated intent that the actions of public bodies are to be taken openly and their deliberations conducted openly. NRS 241.030(4).

§ 5.06 Electronic polling

NRS 241.030(4) specifically provides that electronic communications must not be used to circumvent the spirit or letter of the Open Meeting Law in order to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory powers.

This statute applies to telephone polls (unless done as a part of an open meeting as discussed above), and to polls by facsimile or E-mail.

In *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998), the Chairman of the Board of Regents of the University of Nevada sent by facsimile a draft advisory to all but one regent rebutting public statements made by that regent to the press. The draft advisory was accompanied by a memo requesting feedback on the advisory and sought advice from the other regents on whether to release the advisory to the press. The memo

stated that no press release would occur without board approval. Of the ten regents who received the fax, five responded in favor of releasing the advisory, one wanted it released under the chairman's name only, one was opposed, two had no opinion, and one did not respond. The regents who responded did so by telephone calls to either the chairman or the interim director of public information for the University. In finding that the Board violated the Open Meeting Law by deciding whether to release the draft advisory privately by "facsimile" and telephone rather than by public meeting, the Nevada Supreme Court stated:

> [A] quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. That is not to say that in the absence of a quorum, members of a public body cannot privately discuss public issues or even lobby for votes. However, if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter in a public meeting.

Id.

§ 5.07 Mail polls

In view of the legislative declaration of intent that all actions of public bodies are to be taken openly, the making of a decision by a mail poll that is not subject to public attendance appears inconsistent with both the spirit and intent of the law. *See* Op. Nev. Att'y Gen. No. 85-19 (December 17, 1985).

§ 5.08 Serial communications, or "walking quorums"

In Open Meeting Law parlance, Nevada is a "quorum state," which means that the gathering together of less than a quorum of the members of a public body is not within the definition of a meeting under NRS 241.015(2) and presumably not governed by Open Meeting Law requirements. Thus it may be possible to meet secretly with members of a public body one at a time or in small groups of less than a quorum without violating the Open Meeting Law. Conducting a series of such nonquorum meetings is sometimes referred to as "serial communications."

While the Nevada Supreme Court ruled that meetings between a quorum of a public body and its attorney are not exempt from the Open Meeting Law, it stated in *McKay v. Board of County Commissioners,* 103 Nev. 490, 746 P.2d 124 (1987):

> Nothing whatever precludes an attorney for a public body from conveying sensitive information to the members of a public body by confidential memorandum; nor does anything prevent the attorney from discussing sensitive information in private with

> members of the body, singly or in groups less than a quorum. Any detriment suffered by the public body in this regard must be assumed to have been weighed by the legislature in adopting this legislation. The legislature has made a legitimate policy choice-one in which this court cannot and will not interfere.

Id. at 495-96.

That opinion seems to support the principle that serial communications are not outlawed by the Open Meeting Law. *Cf. Tahoe Regional Planning Agency v. McKay*, 590 F. Supp. 1071 (D. Nev. 1984), *aff'd*, 769 F.2d 534 (9th Cir. 1985).

In addition, the Nevada Supreme Court in *Del Papa* opined:

> [A] quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. *That is not to say that in the absence of a quorum, members of a public body cannot privately discuss public issues or even lobby for votes*. [Emphasis added.]

Serial communications invite abuse to the Open Meeting Law if they are used to accumulate a secret consensus or vote of the members of a public body or to set up what is sometimes referred to as a "walking quorum." The above quotation from the *McKay* decision seems to permit secret *discussions* of sensitive information in serial meetings with less than a quorum, but it stops short of saying that secret serial meetings may be used to take *action* on a public matter. Under NRS 241.015(1) the term "action" includes not only taking a vote, but also making a decision or making a promise or commitment by a majority of public body members present during a meeting. If serial communications are used to line up a walking quorum to take action, they may violate the Open Meeting Law. A California appellate court in *Stockton Newspapers, Inc. v. Redevelopment Agency*, 214 Cal. Rptr. 561 (Cal. Ct. App. 1985) ruled that a series of nonpublic telephone conversations, each between a member of a local redevelopment agency and its attorney, for the commonly agreed purpose of obtaining a collective commitment or promise by a majority of that body concerning public business, constituted a "meeting" within the purview of California's open meeting law. California, like Nevada, is a quorum state.

While Nevada law may not be completely settled on the topic of serial communications, the Office of the Attorney General believes that under certain circumstances they could rise to the level of "meetings" under the definition of NRS 241.015(2) if serial communications are used to accumulate walking quorums that take action behind closed doors. *See* OMLO 98-07 (October 19, 1998) for an example of where serial communications did not rise to the level of a "meeting" under the Open Meeting Law.

§ 5.09 "Private Briefings" among staff of public body and nonquorum of members

In past decisions, the Office of the Attorney General determined that when members of a public body, in groups of less than a quorum, meet privately with staff to discuss public issues, commonly referred to as "private briefings," such briefings do not violate the Open Meeting Law unless there is evidence that the individual briefings are tied together through crossover communication into a collective decision or deliberation toward a decision by the public body.

Under AB 225, 2001, any series of gatherings of members of a public body and their staff (executive directors, managers, department heads, etc.) will presumptively be viewed by this office as intending to "avoid the provisions of Chapter 241." To define a "series of gatherings," we adopt the language of the district court injunction in *Dewey, et al v. Redevelopment Agency*, discussed below. The defendant agency was

> permanently enjoined and restrained from conducting further serial meetings in private with staff and two or more agency members, where such meetings are conducted with a purpose to deliberate toward a decision. For purposes of this Order, "serial meetings" are defined to mean meetings held with two or more members of the Agency followed by another meeting on the same or similar subject with less than a quorum of members of the Agency. This injunction shall not include meetings conducted by staff with Agency members on a one-to-one basis, meetings with Agency members of two or more conducted in public, or communications with Agency members by legal counsel as permitted by *McKay, supra.*

The Open Meeting Law now explicitly prohibits series of gatherings held with the specific intent to avoid the provisions of chapter 241. When complaints are made to this office, the question will be asked, why is the staff person advising the public body in a series, rather than all together at once if the purpose was not to avoid the notice, agenda, and openness of a public meeting? The staff person and public agency members will have to provide a legitimate reason for the series of briefings or else the Open Meeting Law will have been violated by their presumed intent to avoid the law.

The Eighth Edition of this manual cited two cases that were on appeal to the Nevada Supreme Court. The first case, *Venetian Casino Resort, L.L.C. v. County of Clark*, Supreme Court No. 35366, was settled by stipulation, and no Supreme Court decision was issued. In that case the district court concluded that a series of private briefings conducted by members of the agency and staff did not violate the Open Meeting Law because the evidence was insufficient to prove that the members collectively deliberated toward or reached a decision.

The *Venetian* decision is superseded by the new amendments to chapter 241. Under the new amendments, the facts to be proved or disproved will not be limited to the question

of whether the members collectively deliberated or decided but will now include the question of whether, in having the series of gatherings, the members or the staff *intended to avoid* the provisions of chapter 241. The first focus of an inquiry will now be earlier in time and will be on the person(s) who initiated the series of private briefings; it will not matter that the members' collective deliberation cannot be proven. If deliberation can be proven, that will be just one more violation in addition to the violation of intending to avoid the provisions of chapter 241.

The second case was *Jon Severen Dewey v. The Redevelopment Agency of Reno*, Supreme Court No. 35299, in which the district court concluded that a series of private briefings conducted by staff and members of the agency, in less than a quorum, violated the Open Meeting Law. At the time of publication of this edition of the manual, the case was still pending. A court order indicates that the case is possibly moot now that the building in question has been demolished and because the party has been successful in obtaining an injunction against the agency conducting future private meetings.

In *Dewey*, the brief of the party resisting a finding of mootness argues that in AB 225, which amends NRS 241.015, the State Legislature essentially codified that portion of the lower court's ruling prohibiting serial private briefings with less than a quorum. Whether this argument will prevail is unknown at the time of the publication of this edition. But even if it does prevail, it may well miss the point of the amendments, which is that, even before one reaches the question of whether collective, serial deliberation occurred, a violation is proven if the participants convened the gatherings "with the specific intent to void the provisions of this chapter."

While both cases are superseded by the new explicit prohibition against intentional avoidance of the Open Meeting Law, both cases show that evidence of intent will depend on the facts of each situation, and in all instances, the staff and members of public bodies will have to defend their actions by providing adequate reasons, other than desiring to avoid the openness of public meetings, why the series of private gatherings was the chosen means of briefing the public body.

Supervision of a county employee by a single county commissioner is not a gathering of commission members within the definition of "meeting." *See* AG File No. 00-049 (December 11, 2000).

§ 5.10 Meetings held out-of-state or out of local jurisdiction

The Office of the Attorney General believes that the Open Meeting Law applies even if the meeting occurs outside of Nevada.

Nothing in the Open Meeting Law limits its application only to meetings in Nevada, and any such interpretation would only invite evasion of the law by meeting across state lines. A county-based public body may lawfully meet outside the county. *See* AG File No. 00-040 (January 5, 2001).

See also § 4.05, Attorney-Client conferences.

When meeting outside the jurisdictional boundaries of the public body, all requirements of the Open Meeting Law must be met. For example, minutes must be kept, and a clear and complete agenda must be properly noticed.

While the Open Meeting Law does not prohibit out-of-jurisdiction meetings, other statutes might. *See*, for example, the limitations on county commission meetings in NRS 244.085. *See also* Stipulation for Dismissal in *Frankie Sue Del Papa v. Storey County*, Case No. 01-00556A in the First Judicial District Court, May 29, 2001.

§ 5.11 Non-meetings to confer with counsel

The serial communications between "walking quorums" and their attorney were recognized in *McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987), as lawful gatherings of less than a quorum, under the former definition of "meeting." Now, the public attorney no longer needs to engage in a series of gatherings in order to provide information to the multi-person client. In addition, the law specifically allows the members to deliberate, but not act, on the information.

The definition of "meeting" does not now encompass a gathering or series of gatherings of members of a public body at which a quorum is present to receive information from the attorney for the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction, or advisory power and to deliberate toward a decision on the matter.

The receipt of information from the attorney and the public body's deliberation can both occur in the equivalent of a "closed meeting." However, any decision must be made in public at the reopened meeting. The agenda should note that the public body would interrupt the open meeting and exclude the public from the meeting for the limited purpose of receiving the information and for deliberating. The meeting must be recommenced in order to take action.

Alternatively, the public body may gather with the attorney at times other than the time noticed for a normal meeting. In such instances, there is no notice or agenda required. However, the usual notice and agenda will be required in order to later convene an open meeting in order to take action on the information received from the attorney. A decision on whether to settle a case or to make or accept an offer of judgment must be made in an open meeting.

Some or all members of a public body may now attend private, closed settlement conferences without complying with the notice requirements for an open meeting because such gatherings are not within the definition of "meeting."

A caveat: if the public attorney calls for a closed "non-meeting" and an interested party objects, the benefits of the closed session will need to be great enough to justify the

possibility of having to defend a lawsuit challenging the closed session. This area of the law is new, and the opinions of the Attorney General in this regard are untested in court. *See* § 11.05.

§ 5.12 Meetings held with another public body

Whenever a quorum of a public body gathers and discusses, decides, collects information, or otherwise deliberates on matters over which the body has supervision, control, jurisdiction or advisory power, a meeting of that body takes place within the meaning of NRS 241.015(2). Any such meeting must be conducted in accordance with the Open Meeting Law and noticed as a meeting of the attending public body, even if the meeting is publicly noticed as a meeting of another public body. *See* Op. Nev. Att'y Gen. No. 2001-05 (March 14, 2001).

Part 6 WHAT ARE THE NOTICE REQUIREMENTS UNDER THE OPEN MEETING LAW? (*See* Sample Forms 1 and 3)

§ 6.01 General

The right of citizens to attend open public meetings is greatly diminished if they are not provided with an opportunity to know when the meeting will take place and what subject or subjects will be considered. One of the primary objectives of the Open Meeting Law is to allow members of the public to make their views known to their representatives on issues of general importance to the community. This type of communication would be impossible if the public were denied the opportunity to appear at the meeting through lack of knowledge that a meeting would be held.

Except in an emergency, written notice of all meetings of all public bodies must be posted in at least four places within the jurisdiction of the public body and mailed at least three working days before the meeting is to occur as specified below.

Details about how the notice is to be prepared, posted, and mailed are discussed below. **A sample form of a notice is included as Sample Form 1.** This sample is intended only as a sample, and public bodies may use whatever form or format they wish.

The public notice provisions of the Open Meeting Law are subject to the rule of substantial compliance, with a determination of such compliance being dependent on the circumstances of each individual case. *Stelzer v. Huddleston*, 526 S.W.2d 710 (Tex. Ct. App. 1975).

Additionally, notice must be given to individuals whose character, alleged misconduct, professional competence, or physical or mental health are to be considered at a meeting. *See* § 6.09.

Notice must also be given to individuals against whom the public agency is going to take certain administrative actions or from whom real property will be taken by eminent domain. *See* § 6.10.

§ 6.02 Contents of notice (*See* Sample Form 1)

NRS 241.020(2) requires that a meeting notice must include:

- The time, place, and location of the meeting.

- A list of locations where the notice has been posted. *See,* e.g., OMLO 99-06 (March 19, 1999).

- An agenda consisting of:

(1) A clear and complete statement of the topics scheduled to be considered during the meeting.

(2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.

(3) A period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action will be taken.

In addition, it is recommended that the following items be included in a meeting notice or agenda, if appropriate:

- Members of the public body and employees must make reasonable efforts to assist and accommodate physically handicapped persons desiring to attend (NRS 241.020(1)), and there should be a statement that such reasonable accommodations will be made. It is helpful to include the name and telephone number of a person who may be contacted so arrangements can be made in advance to avoid last minute problems.

- If agenda items may be taken out of order, it should so state in the agenda.

- If reasonable time limits or other rules apply to any period devoted to public comment, such rules should be clearly stated on the agenda.

See § 7.02 of this manual for guidance in preparing the agenda.

§ 6.03 Posting the notice

A copy of the notice must be posted in at least four places not later than 9 a.m. of the third working day before the meeting.

It must be posted at the principal office of the public body, or if there is no such office, then at the building in which the meeting is to be held.

It must be posted at a minimum of three other separate, prominent places within the jurisdiction of the public body. NRS 241.020(3)(a). Thus a state agency must post in at least three prominent places within the state, and a local government must post in at least three prominent places within the jurisdiction of the local government (e.g., county, city, town, etc.).

The notices must be posted in "prominent" places. The statute does not define "prominent," and whether a notice is properly posted must be judged on the individual

circumstances existing at the time of the posting. As a general proposition, the Office of the Attorney General offers the following suggestions:

- Try to post the notices in places where they can be read or obtained by members of the public and media who seek them out.

- Unless required by the statute, avoid posting the notices in buildings that will be closed during the notice period.

- If the meeting concerns a regulated industry or profession, post additional notices at trade or professional associations for the industry.

- Community bulletin boards at city halls and county administration buildings may be used.

- Effective January 1, 2003, supplemental notice on the Internet is required if the public body maintains an Internet website. A public body is not required to create a website if it does not already have one. Inability to post notice of a meeting on its website as a result of a technical problem is not a violation of the law. Website notice is not a substitute for the minimum notice required by NRS 241.020(3).

The meeting notice must include a list of the locations where the notice has been posted. *See* NRS 241.020(2)(b). The Office of the Attorney General also suggests that the person posting the required notices routinely execute a simple "certificate of posting" for retention in the files of the public body as proof that this requirement of law was satisfied.

§ 6.04 Mailing notice; mailing lists

In addition to posting the notice, a public body must mail a copy of the notice to any person who has requested notice of meetings. A public body should implement internal record keeping procedures to keep track of those who have requested notice.

The mailing requirement of the law does not require actual receipt of the notice by the persons to whom the notice must be mailed. *See* AG File No. 00-015 (April 7, 2000).

The written notices must be mailed to the requestors "in the same manner in which notice is required to be mailed to a member of the body" and must be "delivered to the postal service used by the body not later than 9 a.m. of the third working day before the meeting." NRS 241.020(3)(b). A public body does not satisfy the requirements of the Open Meeting Law by sending an E-mail to an individual who has requested personal notice of public meetings although the individual may waive his or her statutory right to personal notice by regular mail and instead may elect to receive timely notice by E-mail. *See* Op. Nev. Att'y Gen. No. 2001-01 (February 9, 2001).

NRS 241.020(3)(b) states that a request for mailed notice of meetings automatically lapses six months after it is made to the public body and that the public body must inform the requestor of this fact by enclosure or notation upon the first notice sent. By negative implication, this requirement seems to prohibit a public body from requiring requestors to make a separate written request for notice of each meeting although it can limit requests to six months at a time.

§ 6.05 Calculating "three working days"

Working days include every day of the week except Saturday, Sunday, and holidays declared by law or proclamation of the President. The actual day of a meeting is not to be considered as one of the three working days referenced in the statute. *See* OMLO 99-06 (March 19, 1999).

For example, a Thursday meeting should be noticed by 9 a.m. on Monday of the same week, while a Tuesday meeting must be noticed no later than 9 a.m. Thursday of the preceding week; if the Monday before a Tuesday meeting were a legal holiday, notice would be posted no later than 9 a.m. on Wednesday of the prior week.

§ 6.06 Providing copies of agenda and supporting material upon request

Under NRS 241.020(4), upon any request, a public body shall provide, at no charge, at least one copy of:

- An agenda for a public meeting;
- A proposed ordinance or regulation which will be discussed at the public meeting; and
- Any other supporting material provided to the members of the body except materials:
  - Submitted to the public body pursuant to a nondisclosure or confidentiality agreement;
  - Pertaining to the closed portion of such a meeting of the public body; or
  - Declared confidential by law.

The Office of the Attorney General believes that confidential communications between the counsel and the public body need not be provided under NRS 241.020(4). *See McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987).

The Office of the Attorney General has opined that drafts of proposed orders of the Public Utilities Commission are agenda supporting material under NRS 241.020(4), and copies must be furnished upon request at the time that they are made available to

commission members. *See* OMLO 98-02 (March 16, 1998). Drafts of minutes of previous meeting to be approved at upcoming meeting are agenda supporting material under NRS 241.020(4) and must be provided upon request. *See* OMLO 98-06 (October 19, 1998).

Requests to provide agenda supporting material under NRS 241.020(4) may be treated separately from standing requests to mail notices of meetings under NRS 241.020(3)(b). *See* OMLO 99-06 (March 19, 1999). Agenda supporting material need not be mailed but must be made available over the counter when the material is ready and has been distributed to members of the public body and at the meeting. *See* OMLO 98-01 (January 21, 1998).

When a public body is interviewing candidates for a vacant position in an open session of the meeting, copies of the resumes may not be refused by the public body on the grounds that the resume of the chosen applicant would become part of the personnel file when hired or on the grounds that refusal was necessary to accommodate an applicant's concern that they might suffer ramifications related to their current employment if their resumes and presumably their interest in the position became known to their current employer. *See* AG File No. 00-035 (August 31, 2000).

Agenda supporting materials are not required to be provided until after the appointment of a person if a separate statute or regulation declares the materials to be confidential during the selection and appointment process. *See* AG File No. 00-036 (September 25, 2000).

In situations where a request for agenda supporting materials is made at the meeting, if supporting material is available at the time the agenda must be posted for the upcoming meeting, a public body can satisfy the Open Meeting Law requirement of providing supporting materials "upon any request" by having one "public" copy of the supporting materials available for review at the meeting. The public body need not delay or disrupt its meeting to provide time for several in-meeting requestors to review the one "public" copy provided at the meeting.

As to materials that were not available on the agenda posting date, a member of the public is justified in asking for such materials at the meeting, and the public body must interrupt its meeting to provide the requested copies. Unapproved draft minutes that are on the agenda for approval are agenda support material that must be provided upon request. Material not available on the agenda posting date, but which became available to members of the public body at a later date before the meeting, must immediately be made available to the public at the office of the public body at the time it is sent to members of the public body. *See* AG File No. 00-025 (October 3, 2000).

§ 6.07 Fees for providing notice of copies of supporting material

The material supplied upon request under NRS 241.020(4) clearly must be provided at no cost.

Although the statute does not specifically state, the Office of the Attorney General believes that no charges may be made for sending notices required by NRS 241.020(2) and (3)(b). *See* OMLO 99-07 (February 4, 1999). Generally, governmental bodies may exercise only those powers that are conferred upon them by the Legislature. There is no grant of power to public bodies in the Open Meeting Law which authorizes them to legislate or charge a fee to a person who has requested individual notice of the meetings. Further, charging a fee under such circumstances could have the effect of chilling the right of all Nevada citizens to receive notice of public meetings. We note that mailing a copy of the meeting notice to anyone who requests such notices is deemed by the law to be a part of the "minimum public notice" requirements which all public bodies must meet. The only restriction contemplated by the law is a six-month limitation on the request unless it is renewed by the requestor.

§ 6.08 Emergencies

Emergencies occur and a public body may not be able to wait three days to call a meeting and post a notice and agenda in order to act, or the public body may have already sent out a notice and agenda and cannot amend the agenda and give three days' notice before the meeting. The urgency of the situation may be compounded by the existence of statutory or regulatory deadlines or the fact that the particular public body meets only infrequently.

NRS 241.020(2) provides that *except in an emergency*, written notice of all meetings must be given at least three working days before the meeting. NRS 241.020(5) defines an emergency as: "an unforeseen circumstance which requires immediate action and includes, but is not limited to: (a) Disasters caused by fire, flood, earthquake or other natural causes; or (b) Any impairment of the health and safety of the public."

The Office of the Attorney General believes that an emergency meeting may be called or an item may be taken up on an emergency basis only:

- Where the need to discuss or act upon an item is truly unforeseen at the time the meeting agenda is posted and mailed or before the meeting is called; and

- Where an item is truly of such a nature that immediate action is required at the meeting.

In an emergency, the Office of the Attorney General believes that:

- A meeting may be scheduled with less than three days' notice if the meeting is limited only to the matter which qualifies as an emergency. The minutes of the meeting should reflect the nature of the emergency and why notice could not be timely given.

- If a meeting has already been scheduled, notice has already been posted and mailed, and less than three working days remain before the meeting, the

emergency item may be added to the agenda at the meeting. The minutes should reflect the nature of the emergency and why notice could not be timely given.

- If a meeting has been scheduled, and it is possible to amend the notice and agenda and to post and mail the amended notice (or a notice of an emergency item to be added to the agenda) more than three working days before the meeting, the notice and agenda should be so amended.

In all cases, whenever a matter is taken up as an emergency, the Office of the Attorney General recommends that the public body provide as much supplementary notice to the public and the news media as is reasonably possible under the circumstances. Further, all other requirements of the Open Meeting Law must be observed. The Office of the Attorney General cautions, however, that a true emergency must exist and the rule must not be invoked as a subterfuge by a public body to avoid giving notice of that agenda item to the public. Op. Nev. Att'y Gen. No. 81-A (February 23, 1981) gives an example of when an emergency did not exist. This opinion discusses a situation where, in a regularly scheduled meeting of a public body, dissention quickly arose between the members so much so that the meeting became acutely tense and emotional. In an attempt to relieve the pressure, the board went into an unscheduled executive session to "discuss the professional competence and character of a person" (including some its members). Noting that the dissention on the board had been known for months, the Office of the Attorney General determined that a sufficient emergency did not exist to go into the unscheduled executive session because there was ample time to provide written public notice of the need for an executive session during a regularly scheduled meeting to discuss the matters. *See also* OMLO 99-10 (August 24, 1999), where the Office of the Attorney General opined that administrative error does not establish grounds to hold an emergency meeting without giving proper notice. A statutory deadline for action by a county commission to submit a ballot question is not an unforeseen circumstance. *See* AG File No. 00-029 (August 9, 2000). The need to seize records of a development authority is foreseeable and, therefore, not an emergency. *See* AG File No. 01-039 (August 20, 2001).

§ 6.09 Providing individual notice to persons whose character, alleged misconduct, professional competence, physical or mental health are to be considered; waivers of notice (*See* Sample Form 3)

Under NRS 241.033(1) a public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person unless it has given written notice to that person of the time and place of the meeting. This applies whether the meeting will be open or closed.

A sample form of notice and proof of service is attached as Sample Form 3.

The notice must be either delivered personally to that person at least 5 working days before the meeting or must be sent by certified mail to the last known address of that person at least 21 working days before the meeting. A similar notice is required by

AB 225 to persons against whom administrative action will be taken or whose real property will be acquired by eminent domain.

The public body must receive proof of service of the notice before the meeting may be held.

The Nevada Athletic Commission is exempt from the timing requirements (e.g., 5 working days for personal service or 21 days for certified mail) but must still give written notice of the time and place of the meeting and must receive proof of service before conducting the meeting. NRS 241.033(2).

The notice requirements apply to applicants for professional licenses if their character, alleged misconduct, professional competence, or physical or mental health is to be considered at the meeting. *See* Attorney General Letter Opinion to Jerry Higgins, Nevada Board of Professional Engineers and Land Surveyors, dated October 28, 1993 (licensing board which will consider applicants' character and professional competence must properly notice each applicant in accordance with SB 174).

There is no prohibition against waivers of the notice, and the courts consistently recognize that an individual may, by express or implied waiver, relinquish a known statutory right. However, a waiver carries legal consequences, and therefore must be a valid waiver. A waiver of a statutory right is deemed valid if it is clear and unambiguous, given voluntarily, and intended to relinquish a known statutory right. *CBS, Inc. v. Merrick,* 716 F.2d 1292 (9th Cir. 1983); *State Board of Psychological Examiners v. Norman,* 100 Nev. 241, 679 P.2d 1263 (1984).

An express agreement to waive a known statutory right will be given its intended force and effect. *Royal Palm Savings Ass'n v. Pine Trace Corp.,* 716 F. Supp. 1416 (M.D. Fla. 1989). It is recommended the waiver be obtained in writing expressing: (1) the voluntary nature of the waiver; (2) the applicant's knowledge about the statutory right; and (3) the applicant's intention to relinquish that right. *See* Attorney General Letter Opinion to Jerry Higgins, Nevada Board of Professional Engineers and Land Surveyors, dated October 28, 1993.

§ 6.10 Providing individual notice to persons against whom the public body may take certain administrative action or from whom the public body may acquire real property by the exercise of the power of eminent domain.

Under AB 225, a public body may not hold a meeting to take certain administrative actions against a person or to acquire real property by condemnation from a person unless the public body has given written notice to that person. The written notice must be either: (1) delivered personally to the person at least 5 working days before the meeting; or (2) sent by certified mail to the last known address of the person at least 21 working days before the meeting. The written notice to the person is required in addition to the notice of meeting required by NRS 241.020. *See* § 6.02 and § 6.04.

A public body must receive proof of service of the written notice before the public body may consider the matter. Proof of receipt of the notice is not required.

The terms "take," "administrative action," and "person" are not defined by chapter 241 or by AB 225. With respect to the eminent domain provision, the terms "acquire," "owned," and "person" are not defined. The terms "administrative action" and "against a person," if interpreted and defined broadly, would encompass a myriad of actions performed by local governments and state agencies, which common sense indicates were not all intended to be covered by the new notice provisions of AB 225.

The intention of the Legislature as to the coverage of "actions" is not possible to discern at the time this edition of the manual was printed. The Assembly history is available but not helpful, and the Senate history is not available. Given the many questions that AB 225 raises, we expect the Legislature to revisit the subject. Until the Legislature has the opportunity to further define these terms and until the courts have done the same, this office will have to take a position on the scope of these terms from the perspective of the office's enforcement responsibilities. From that perspective, persons will have at least some idea of what kinds of actions this office will consider unlawful under this new section of chapter 241 for purposes of responding to and prosecuting complaints made to this office under NRS 241.037(1).

BEWARE, however, that just because this office may consider a particular act lawful or believes the issue too uncertain to prosecute, a district court in a civil case may reach a different conclusion in a lawsuit initiated by someone other than the Attorney General under NRS 241.037(2). *See* § 12.05.

For purposes of enforcement actions under NRS 241.037(1), this office may initially follow these tentative guidelines:

1. Except as noted below, "person" includes natural persons and inanimate entities such as partnerships, corporations, trusts, and limited liability companies. "Person" includes essentially anything legally capable of holding an interest in property or legally capable of receiving a permit or license.

2. "Administrative action" includes any decision that is made by a quorum of a governing body or by a person or group smaller than a quorum that has been delegated de facto authority in such a manner as to be the alter ego of the public body.

3. "Administrative action" does not include action by officials such as building officials, zoning enforcement officers, and others who have been granted authority and duties by an ordinance or regulation and who make their decision to act in a case without reference to oversight or other pre-decision involvement in the case from the public body. Such officials may be subject to post-decision involvement such as appeals to the public body as provided in the ordinance or regulation.

4. Action *"against a person"* occurs in two instances:

(a) In situations where the person formally requests an official governmental approval that is required by law to be granted or denied by the public body. For example, all zoning changes, but not all variances. Variances that are granted or denied by a single official are not subject to the new notice requirements of AB 225.

(i) A person who protests the granting of a governmental approval is not a person *"against"* whom action is taken under AB 225. For example, a protestant against a variance, zone change or license, whose protest is overruled, is not a person *"against"* whom the public body's action is taken. Therefore, an approval of a zone change or the granting of a water permit, while certainly against the protestant, is not an action "against a person" within the meaning of AB 225 and NRS chapter 241.

A protestant is frequently entitled to notices pursuant to other statutes and ordinances that govern the subject about which a decision is made, and failure to give those notices will be a violation of those laws, but failure to give those notices will not be a violation of the Open Meeting Law.

(ii) As an exception to paragraph (a) above, if a person who is a protestant or who plans to be a future protestant to a future administrative decision, gives the public body written demand to be given the notice described in AB 225, that person must be given the notice in the manner required by AB 225.

(b) In situations where the governing body has authority to initiate enforcement actions against a person and to thereafter impose a penalty or discipline on the person. Such actions include deciding to file a lawsuit or an administrative proceeding but do not include deciding to initiate an investigation or other process that is preliminary to deciding to file the lawsuit or preliminary to deciding to commence the administrative process.

(i) A decision to hold a hearing at a future date in which the person will be a defendant or respondent is not an "action against a person;" the action *against* the person comes later, at the actual *commencement* of the hearing, or if there is not to be a hearing, then the "action against" is the final decision of the public body. The additional AB 225 notice must be given of the date on which the hearing will commence or the date on which the final decision will be made in the absence of a hearing.

(ii) A decision to continue a hearing to a future date is not an "action against a person" under AB 225.

5. "Action against a person" does not occur unless the matter being acted on is uniquely personal to the individual or entity. "Action against a person" does not occur when the legal basis of the action is consideration of the inanimate characteristics of a facility or property and no consideration of the characteristics or qualifications of the individual or entity (the person) that has sought the governmental approval.

For example, a decision against an applicant for a barber's license for the individual practitioner is subject to AB 225, but a decision against an applicant for a barbershop license is not.

Also not covered by AB 225 are actions on taxation matters made by local and state taxing authorities, including accessors, treasurers, boards of equalization, the state tax commission, and others who make decisions to appraise a property, to set valuations, to decide appeals, to make equalizations, or to act on other requests for relief from property owners. Such decisions depend on the characteristics of the property, not the characteristics of the owner, and therefore are actions taken against the property and not "against a person" within the meaning of AB 225. Penalties that flow from such actions are not "against a person" even though a person must pay the penalty.

Some business and occupational licenses issued by state and local governments may be a crossover area. Some statutes, regulations and ordinances grant, condition, or deny a particular license solely on the adequacy of the premises (sanitation, fire codes, square footage, zoning) without reference to the personal aspects of the business person seeking the license. These types of business licenses are not subject to AB 225. But if a business license is granted or denied in part by reference to the personal aspects of the applicant, then AB 255 applies.

(a) "Action against a person" within the meaning of AB 225 does not include adoption of ordinances or regulations; the granting or denying of petitions for declaratory orders or advisory opinions; action on zoning requests, building permits, most variances, and other land use decisions that do not depend on the identity, status, personal qualifications, or characteristics of the person.

These decisions are "against" the entire population, whole neighborhoods, industries, and other interest groups. Notice to such large numbers of persons is not required by AB 225.

(b) An act is not subject to the additional notice requirements of AB 225 if the action depends on the application of either objective or discretionary standards and criteria to land, water, air, or other inanimate matters unrelated to the personal qualities and characteristics of the owner of the property that is subject to the authority of the public body.

(c) Note that other statutes and ordinances typically have extensive notice provisions for the special subject matter covered. Those laws must be complied with but failure to do so will not be a violation of chapter 241.

(d) Imposing discipline on a person is an "action against a person." Most penalties (except for taxation) are uniquely personal because they are based on the misconduct of a person and, therefore, are "actions against a person."

6. Decisions to accept gifts and to purchase, sell, encumber, or lease any interest in real or personal property are examples of non-personal, inanimate-subject decisions that are not within the meaning of "administrative action against a person," even though each decision may be, in a very real sense, "against" someone, unless the purchase involves eminent domain in which case the owner of the property must be notified.

As an exception to paragraph 6 above, if a person who is a protestant or who plans to be a future protestant to a future administrative decision to accept gifts or to purchase, sell, encumber, or lease property, gives the public body written demand to be given the notice described in AB 225, that person must be given the notice in the manner required by AB 225.

Part 7 WHAT ARE THE REQUIREMENTS FOR PREPARING AND FOLLOWING THE AGENDA? (*See* Sample Form 1)

§ 7.01 General

A public body's failure to adhere to agenda requirements will result in an Open Meeting Law violation. *Thurston v. Phoenix*, 757 P.2d 619 (Ariz. Ct. App. 1988). Further, if a matter is acted upon which was not clearly denoted on the agenda, the action could be void under NRS 241.036.

NRS 241.020(2)(c) requires that agendas include the following as a minimum:

> (1) A clear and complete statement of the topics scheduled to be considered during the meeting.
> (2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.
> (3) A period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2).

§ 7.02 Agenda must be clear and complete (*See* Sample Form 1)

The Office of the Attorney General has written five opinions on agendas. One was written before the "clear and complete" agenda requirements were written into the law, and the other four after. *See* Op. Nev. Att'y Gen. No. 79-8 (March 26, 1979), and Op. Nev. Att'y Gen. No. 91-6 (May 23, 1991); OMLO 99-01 (January 5, 1999); OMLO 99-02 (January 15, 1999); OMLO 99-03 (January 11, 1999).

The following guidelines are gleaned from those opinions:

- Merely indicating "Licensing Board" on an agenda without listing the names of the licensees who will be considered is not proper.

- An agenda item for consideration of business permits should include the name and, where appropriate, the address of the proposed business and/or applicants.

- Agenda items must be described with clear and complete detail so that the public will receive notice in fact of what is to be discussed by the public body.

- Use a standard of reasonableness in preparing the agenda and keep in mind the spirit and purpose of the Open Meeting Law.

- Always keep in mind the purpose of the agenda is to give the public notice of what its government is doing, has done, or may do.

- The use of general or vague language as a mere subterfuge is to be avoided.

- Use of broad or unspecified categories in an agenda should be restricted only to those items in which it cannot be anticipated what specific matters will be considered.

- An agenda must never be drafted with the intent of creating confusion or uncertainty as to the items to be considered or for the purpose of concealing any matter from receiving public notice.

- Agendas should be written in a manner that actually gives notice to the public of the items anticipated to be brought up at the meeting.

- Generic agenda items such as "President's Report," "Committee Reports," "New Business," and "Old Business" do not provide a clear and complete statement of the topics scheduled to be considered. Such items should not be listed as action items as they do not adequately describe items upon which action is to be taken. *See* OMLO 99-03 (January 11, 1999).

- Agendas for retreats should identify the event as a retreat, give the objectives to be accomplished, and include the specific topics for discussion scheduled by retreat organizers. *See* OMLO 99-02 (January 15, 1999). *See* § 6.02 for items that may be included in the agenda if not covered in the notice for the meeting.

Additionally, based on some of the complaints received by the Office of the Attorney General, the following suggestions are offered:

- Public bodies should not "approve" or take action on administrative reports by staff unless the agenda clearly denotes the report as an action item and specifically sets out the matter to be acted on within the report.

- Generic items such as "reports" or "general comments by board members" invite trouble because discussions spawned under them may be of great public interest and may lead to deliberations or actions without the benefit of public scrutiny or input. Generic items should be used sparingly and carefully, and actual discussions should be tightly controlled. Matters of public interest should be rescheduled for further discussion at later meetings.

- Agenda descriptions for resolutions, ordinances, regulations, statutes, rules or other such items to be considered by public bodies should describe what the statute, ordinance, regulation, resolution, or rule relates to so that the public may determine if it is a subject in which they have an interest. *See* OMLO 99-01 (January 5, 1999); OMLO 99-03 (January 11, 1999).

§ 7.03 Stick to the agenda

Many complaints received by the Office of the Attorney General have to do with public bodies wandering off their agendas. Discussions may start on an agenda item but then drift off into other matters. The chair for the meeting or counsel should be vigilant to stop the drifting in order to prevent Open Meeting Law violations. *See* OMLO 98-03 (July 7, 1998) for an example of how a public body can violate the Open Meeting Law by wandering off its meeting agenda. *See also* OMLO 99-09 (July 28, 1999) for an example of how a budget workshop designated for discussion and review of a proposed budget resulted in several violations of the Open Meeting Law when members of the public body made decisions on various items within the proposed budget.

Deviating from the agenda by commencing a meeting prior to its noticed meeting time violates the spirit and intent of the Open Meeting Law and nullifies the purpose of the notice requirements set forth in NRS 241.020(2). *See* OMLO 99-13 (December 13, 1999).

A public body may combine agenda items to be discussed together at the same time if an announcement is made at the meeting, so as to avoid confusion about what is being discussed. *See* AG File No. 00-023 (September 20, 2000).

An action against the Board of Regents is pending in the First Judicial District Court, Case No. 00-01632A, wherein the complaint alleges that a board committee considered matters in addition to the topics listed on the agenda despite legal advice from the committee's counsel and previous warnings from the Office of the Attorney General. AG File No. 00-041 (September 21, 2000).

§ 7.04 Matters brought up during public comment

Pursuant to NRS 241.020(2)(c)(3), a period devoted to comments by the general public, if any, and a discussion of those comments must be included on each meeting agenda. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken.

The designated public comment period required by NRS 241.020(2)(c)(3) should be content neutral and not restricted to nonagenda items unless the public is permitted to speak on agenda items as they are heard. *See* OMLO 99-12 (October 14, 1999). *See* § 8.04 for the requirements for conducting the public comment period. The Open Meeting Law does not limit a public body's discretion to refuse to place on the agenda an item requested by a member of the public. Any limits are a matter of general administrative law. *See* AG File No. 00-047 (April 27, 2001). Where a meeting is continued to a future date, the reconvened meeting at the later date is a second, separate meeting for purposes of public comment, and a member of the public is entitled to make public comment on the same subject at both meetings. *See* AG File No. 01-012 (May 21, 2001).

Part 8 WHAT ARE THE REQUIREMENTS FOR CONDUCTING AN OPEN MEETING?

§ 8.01 General

In conducting meetings, one should always remember the message in NRS 241.010: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." In interpreting a similar provision in California's open meeting law, the court of appeals delivered a humbling message when it said:

> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over instruments they have created. *Stockton Newspapers, Inc. v. Redevelopment Agency,* 214 Cal. Rptr. 561 (Cal. Ct. App. 1985).

Accordingly, NRS 241.020 requires that, except as otherwise provided by statute, all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies; NRS 241.040 makes wrongful exclusion of any person from a meeting a misdemeanor.

§ 8.02 Facilities

Public meetings should be held in facilities that are reasonably large enough to accommodate attendance by members of the public.

Sometimes controversial public issues generate a larger than expected crowd and a change of location or other methods (e.g., video transmission in adjoining rooms or areas) may have to be employed in order to accommodate those persons seeking to attend a particular meeting. But even if reasonable efforts like these prove inadequate to accommodate everyone, the meeting still would qualify as a public meeting for purposes of the Open Meeting Law. *Gutierrez v. City of Albuquerque*, 631 P.2d 304 (N.M. 1981).

The Office of the Attorney General is of the opinion public bodies should avoid holding public meetings in places to which the general public does not feel free to enter, such as a restaurant, private home, or club. While perhaps not in violation of the letter of the Open Meeting Law, a meeting in such a location may be in violation of the law's spirit and intent. *Cf. Crist v. True*, 314 N.E.2d 186 (Ohio Ct. App. 1973). It is unlawful to start a meeting before the public is allowed into the room. The public body must wait until the

public has been admitted to the meeting facility before commencing the meeting. *See* AG File No. 01-002 (April 5, 2001).

§ 8.03 Accommodations for physically handicapped persons

NRS 241.020(1) provides that public officers and employees must make "reasonable efforts to assist and accommodate physically handicapped persons desiring to attend" meetings of a public body. In order to comply with this statute, it is required that public meetings be held, whenever possible, only in buildings which are reasonably accessible to the physically handicapped, i.e., those having a wheelchair ramp, elevators, etc., as may be appropriate. *See Fenton v. Randolph*, 400 N.Y.S.2d 987 (N.Y. Sup. Ct. 1977).

§ 8.04 Allowing members of public to speak; reasonable rules and regulations

Except during the public comment period required by NRS 241.020(2)(c)(3), the Open Meeting Law does not mandate that members of the public be allowed to speak during meetings. Some public bodies choose to hear public comment during individual agenda items, but that is not a requirement of the Open Meeting Law.

Reasonable rules and regulations that ensure orderly conduct of a public meeting and ensure orderly behavior on the part of those persons attending the meeting may be adopted by a public body, and the Office of the Attorney General believes that reasonable restrictions, including time limits, can be imposed on speakers. However, any rule or regulation that limits or restricts public comment must be clearly articulated on the agenda. *See* OMLO 99-08 (July 8, 1999). Requiring prior approval of the use of electronic devices during public comment is reasonable and not in violation of the Open Meeting Law. *See* AG File No. 00-046 (December 11, 2000).

The Office of the Attorney General believes that any practice or policy that discourages or prevents public comment, even if technically in compliance with the law, may violate the spirit of the Open Meeting Law. *See* OMLO 99-11 (August 26, 1999) where the Office of the Attorney General opined that, in its practical application, the practice of requiring persons to sign up three and one-half hours in advance to speak at a public meeting can have the effect of unnecessarily restricting public comment and therefore does not comport with the spirit and intent of the Open Meeting Law.

A public body's restrictions must be neutral as to the viewpoint expressed, but the public body may prohibit comment if the content of the comments is a topic that is not relevant to, or within the authority of, the public body, or if the content of the comments is willfully disruptive of the meeting by being irrelevant, repetitious, slanderous, offensive, inflammatory, irrational or amounting to personal attacks or interfering with the rights of other speakers. *See* AG File No. 00-047 (April 27, 2001).

A member of the public may not be excluded from a tour taken by a public body during a meeting, for example, where a jail advisory committee scheduled a tour of the county jail. While the sheriff may have authority to exclude persons, if persons are excluded, the

public body violates the Open Meeting Law if the tour is taken without the excluded member of the public. *See* AG File No. 00-013 (March 30, 2001).

When public comment is allowed during the consideration of a specific topic, the chairman may limit public comments to the topic, provided the limits are viewpoint neutral. When public comment is not allowed during the consideration of a specific topic on the agenda, the public body may not limit the comments to any particular agenda topic but must allow comment on any subject within the authority of the public body. *See* AG File No. 01-022 (May 31, 2001) and AG File No. 00-047 (April 27, 2001).

§ 8.05 Excluding people who are disruptive

If a person willfully disrupts a meeting to the extent that its orderly conduct is made impractical, the person may be removed from the meeting. NRS 241.030(3)(b). The chair of the public body may, without vote of the body, declare a recess to remove a person who is disrupting the meeting. *See* AG File No. 00-046 (December 11, 2000).

§ 8.06 Excluding witnesses from testimony of other witnesses

Under NRS 241.030(3)(c), a witness may be removed from a public or private meeting during the testimony of other witnesses. This applies even if the witness is an employee of the state agency that is prosecuting the case. Unless otherwise stipulated, the witness may continue to be excluded after he testifies. *See* Op. Nev. Att'y Gen. No. 93 (November 21, 1963). The witness should be allowed entrance after all other witnesses have testified.

§ 8.07 Votes by secret ballot; different majority voting requirements of members present at the meeting as distinguished from total number of members of the agency

Since secret ballots defeat the accountability of public servants, the Office of the Attorney General believes they are not permitted under the Open Meeting Law. *Cf. News & Observer Publishing Co. v. Interim Board of Education*, 223 S.E.2d 580 (N.C. Ct. App. 1976); *Olathe Hospital Foundation, Inc. v. Extendicare, Inc.*, 539 P.2d 1 (Kan. 1975); *State ex rel. Wineholt v. Laporte Superior Ct.*, 230 N.E.2d 92 (Ind. 1967).

But that does not mean all votes must be by roll call. The Open Meeting Law is satisfied if a vote is by roll call, show of hands, or any other method so that the vote of a public official is made known to the public. *Esperance v. Chesterfield Township*, 280 N.W.2d 559 (Mich. Ct. App. 1979).

A public body that is required to be composed of only elected officials may not take action by vote unless at least a majority of all of the members of the public body vote in favor of the action. A public body may not count an abstention as a vote in favor of an action. (SB 329).

In view of the above voting requirement, “action” is redefined to also mean:

(a) If a public body has a member who is not an elected official, an affirmative vote taken by a majority of the members present during a meeting of the public body; and

(b) If all the members of a public body must be elected officials, an affirmative vote taken by a majority of all the members of the public body.

For example, if only 3 members of a 5 person county commission are present at a meeting, the 3 cannot take action by a 2 to 1 vote; the vote must be 3 to 0, since a majority (3) must be in favor of the action.

The Open Meeting Law can never force a public body to take action on any agenda topic. *See* AG File No. 00-018 (June 8, 2000).

§ 8.08 Recordings

Under NRS 241.035(3), members of the public may be allowed to record on audio tape or any other means of sound or video reproduction if it is a public meeting and the recording in no way interferes with the conduct of the meeting.

§ 8.09 Telephone conferences

See § 5.05 for a discussion of the proper way to conduct telephone conferences.

Part 9 WHEN ARE CLOSED MEETINGS AUTHORIZED AND HOW ARE THEY TO BE HANDLED?

§ 9.01 General

This part discusses when closed meetings (sometimes referred to as "executive sessions" or "personnel sessions") may be held and how they should be conducted.

The opening clause in NRS 241.020(1) provides that all meetings must be open and public "except as otherwise provided by specific statute." The words "specific statute" are important ones. The Nevada Supreme Court is reluctant to imply exceptions to the rule of open meetings and looks for a specific statute mandating the exception or exemption. *See McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987). *See also* Op. Nev. Att'y Gen. No. 150 (November 8, 1973). The Open Meeting Law is entitled to a broad interpretation to promote openness in government and any exceptions thereto should be strictly construed. *McKay v. Board of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986). Thus, closed sessions should be allowed only when specifically authorized and must be tightly controlled.

§ 9.02 When closed sessions may be held

Closed sessions may be held:

- By any public body to consider character, alleged misconduct, professional competence, or the physical or mental health of a person, with some exceptions. *See* § 9.04.

- By the Certified Court Reporters' Board to deliberate on a decision to be reached upon any contested hearing and to prepare, administer, or grade examinations. *See* NRS 656.090.

- By the Public Employees Retirement Board: (1) to meet with investment counsel, provided the closed session is limited to planning future investments or the establishment of investment objectives and policies, and (2) to meet with legal counsel provided the closed session is limited to advice on claims or suits by or against the system. NRS 286.150(2).

- By the State Board of Pharmacy to deliberate on the decision in an administrative action (subsequent to a public evidentiary hearing) or to prepare, grade, or administer examinations. *See* NRS 639.050(3) and Op. Nev. Att'y Gen. No. 81-C (June 25, 1981).

- By any public body to take up matters or conduct activities which are exempt under the Open Meeting Law. *See* Part 4 of this manual. If the public body has

other matters that must be considered in an open meeting, the Office of the Attorney General believes that a public body may take up an exempt matter during the open meeting if it desires. However, by virtue of the exemption, none of the open meeting requirements will apply to the exempt activity although it is recommended that a motion or announcement be made identifying the activity as an exempt activity to avoid confusion between an exempt activity and a closed session to which certain open meeting requirements may otherwise apply.

- By public housing authorities when negotiating the sale and purchase of property, but the formal acceptance of the negotiated settlement should be made in an open meeting. *See* Op. Nev. Att'y Gen. No. 372 (December 29, 1966).

- As authorized by a specific statute.

§ 9.03 When closed sessions may not be held

Closed sessions may not be held:

- To discuss the appointment of any person to public office or as a member of a public body. NRS 241.030(3)(e). *See* discussion in § 9.04.

- To consider the character, alleged misconduct, professional competence, or physical or mental health of an elected member of a public body. NRS 241.031. *Cf*. Op. Nev. Att'y Gen. 81-A (February 23, 1981), written before NRS 241.031 was enacted.

- To conduct attorney-client communications, unless specifically authorized by statute. *See* discussion in § 4.05 of this manual.

- To select possible recipients for awards. To the extent that a public body is considering the character, alleged misconduct, professional competence, or physical or mental health of a person under consideration for receipt of a public award, a public body may meet in closed session to discuss such matters. However, any vote taken with respect to granting the award must be in a public meeting.

- To consider indebtedness of individuals to a hospital. The Office of the Attorney General has determined that county hospital board meetings that relate to indebtedness of individuals to the hospital are required to be open and public. *See* Op. Nev. Att'y Gen. No. 148 (October 2, 1973).

- By a local ethics board to discuss past conduct of a public official. *See* Op. Nev. Att'y Gen. No. 94-21 (July 29, 1994).

- Where not authorized by law.

§ 9.04 Meetings to consider character, allegations of misconduct, professional competence, or physical or mental health of a person; limitations

NRS 241.030(1) states: "Except as otherwise provided in NRS 241.031 and 241.033, nothing contained in this chapter prevents a public body from holding a closed meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person."

As discussed above, exceptions are:

- NRS 241.031 prohibits such closed meetings regarding an elected member of a public body.

- NRS 241.030(3)(e) prohibits such closed meetings "for the discussion of the appointment of any person to public office or as a member of a public body." *See* discussion in § 9.05.

- NRS 241.033 prohibits any closed meeting to discuss the character, alleged misconduct, professional competence, or physical or mental health of a person unless certain notice requirements are met. *See* § 6.09 in this manual.

The word "character" was defined in *Miglionico v. Birmingham News. Co.*, 378 So. 2d 677 (Ala. 1979) to include one's general reputation. It might also include such personal traits as honesty, loyalty, integrity, reliability, and such other characteristics, good or bad, which make up one's individual personality. In Op. Nev. Att'y Gen. No. 81-A (February 23, 1981), the Office of the Attorney General opined that the word encompassed that moral predisposition or habit or aggregate of ethical qualities, which is believed to attach to a person on the strength of the common opinion and report concerning him . . . a person's fixed disposition or tendency, as evidenced to others by his habits of life, through the manifestation of which his general reputation for the possession of a character, good or otherwise is obtained.

In Op. Nev. Att'y Gen. No. 81-A (February 23, 1981), the Office of the Attorney General also construed the word "competence" to include: . . . duly qualified . . . answering all requirements . . . having sufficient ability or authority . . . possessing the natural or legal qualifications . . . able . . . adequate . . . suitable . . . sufficient . . . capable . . . legally fit.

Note that such closed sessions may be held only to *consider* the character, alleged misconduct, professional competence, or physical or mental health of a person. The Open Meeting Law does not permit taking *action* in closed session on such matters. This distinction was drawn in *McKay v. Board of Supervisors,* 102 Nev. 644, 730 P.2d 438 (1986), where it was held the board did not violate the Open Meeting Law when it went into closed session to discuss the character, alleged misconduct and professional competence of the city manager, but terminating the city manager in closed session violated the law. *See also* Op. Nev. Att'y Gen. No. 81-A (February 23, 1981), and Op. Nev. Att'y Gen. No. 81-C (June 25, 1981).

The Office of the Attorney General believes that the holding in *McKay* has important implications in employment interviews and performance evaluations. While the delineated attributes of employment candidates may be discussed in closed session, the public body may not use the closed session to narrow down candidates or begin the selection process. *See Brown v. East Baton Rouge Parish School Board*, 405 So. 2d 1148 (La. Ct. App. 1981). Similarly, while the delineated attributes of existing employees may be discussed in closed session (with or without the presence of the employee), evaluation forms may not be filled out during the closed session, nor may the public body form recommendations or decisions about a rating or an action to take. Those tasks must be done in an open meeting or delegated to a member to handle. The closed session should be limited to specific discussions about the specific person. General discussions about general policies or practices may not be held during a closed session. *See Hudson v. School District of Kansas City*, 578 S.W.2d 301 (Mo. Ct. App. 1979).

While it can be difficult to properly describe an action item relating to a closed personnel session because one cannot anticipate the outcome of the closed session, one can describe, on the agenda, the parameters of allowable action by stating "possible action including, but not limited to, termination, suspension, demotion, reduction in pay, reprimand, promotion, endorsement, engagement, retention, or 'no action'." *See* AG File No. 00-007 (June 1, 2000).

The statutes do not authorize closure of general "personnel sessions." Closed sessions are only authorized for discussion of the matters specifically listed in NRS 241.030. *See* AG File No. 00-043 (January 24, 2001). It is not adequate to state, vaguely, that the closed session is regarding an individual (such as a manager). The agenda description must specifically state the topic of the discussion, such as, the performance of the individual (manager). *See* AG File No. 00-050 (March 28, 2001).

Finally, it should be noted that while such closed sessions are permitted, they are not required under the Open Meeting Law.

§ 9.05 The appointment to "public office" exception

Under NRS 241.030(3)(e), closed sessions may not be held "for the discussion of the appointment of any person to public office or as a member of a public body." This prohibition was discussed in *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974 (1989). In that case, the city council conducted employment interviews for the city clerk position in the open and then held a brief closed meeting to discuss the character and professional competence of candidates. The council went back into open session to make the selection, but it was held the closed session was still a violation of the Open Meeting Law. The Nevada Supreme Court construed the prohibited "discussion of the appointment" to include "all consideration, discussion, deliberation and selection done by a public body in the appointment of a public office." The ruling seems to cover all aspects of the appointment process.

The Open Meeting Law does not define "public office." In Op. Nev. Att'y Gen. No. 193 (September 3, 1975), the Office of the Attorney General opined that NRS 241.030(3)(e) encompasses: (1) all elected public officers, and (2) all persons appointed to positions created by law whose duties are specifically set forth in law and who are made responsible by law for the direction, supervision, and control of their agencies. In *City Council of Reno*, NRS 281.005 was used by stipulation of the parties to define public office.

§ 9.06 How to handle closed sessions to consider character, allegations of misconduct, professional competence, or physical and mental health of a person

For closed sessions under NRS 241.030(1), the following procedures are required or recommended:

- Start with a duly noticed open meeting. Closed meetings are still "meetings" within the definition and ambit of the Open Meeting Law.

- It is recommended the matter be indicated on the agenda as a closed session under NRS 241.030(1). This assures compliance with the spirit of NRS 241.020(2)(c)(1). *See* § 7.02. The name of the individual being discussed may be indicated, but if confidentiality is a consideration, *see* § 9.07 for further discussion in this regard. An agenda item of "Executive Session" does not adequately describe a closed session. *See* AG File No. 00-021 (September 7, 2000).

- The closed session should not be listed as an "action" item on the agenda because action cannot be taken during the closed session. *See* discussion in § 9.04.

- If action might be taken on the matter, be sure to include a separate item on the agenda for action to be taken during open session. *See* discussion in § 9.04.

- Give notice to the subject person as required by NRS 241.033(1). *See* § 6.09 of this manual.

- At the meeting, a motion must be made to go into closed session and the motion must specify the business to be conducted during the closed session. NRS 241.030(2). *See* AG File No. 01-021 (May 14, 2001). Only the business identified in the motion may be discussed. As stated in Op. Nev. Att'y Gen. No. 81-A (February 23, 1981), the purpose of the motion is two-fold: (1) so members of the public body understand the parameters of what can be discussed in closed session so as not to deviate from the strict requirements of the law, and (2) to assure that notice is given to the person being discussed so he or she can obtain a copy of the minutes. If confidentiality is a consideration, *see* § 9.07.

- It is up to the chairperson to decide who shall be included in the closed session. The Open Meeting Law is silent about who may attend closed sessions.

- Before proceeding with the discussion, make sure that proof of service of the notice to the person has been received. If not, the closed session may not proceed, absent waiver. *See* NRS 241.033(1) and § 6.09.

- If any portion of the open meeting was tape recorded by the public body, then the closed session must also be tape-recorded. NRS 241.035(5). As the recordings of closed sessions are treated differently than those of open sessions, NRS 241.035(2), it is recommended the closed session be recorded on a separate tape.

- If the subject is allowed to attend the closed session and desires to record the session, the Office of the Attorney General recommends that he or she be permitted to do so. NRS 241.035(3).

- Minutes must be kept of the closed session, and they must be prepared with the same detail as minutes of the open session. NRS 241.035(2).

Op. Nev. Att'y Gen. No. 81-A (February 23, 1981) contains a lengthy discussion about the improper use and conduct of an executive session, and the possible remedy.

§ 9.07 Preserving confidentiality on the agenda and with the motion to go into closed session

The Office of the Attorney General believes that NRS 241.030(1) contemplates some degree of confidentiality when it allows closed sessions to consider the character, alleged misconduct, professional competence, or physical or mental health of a person. Where a closed session is authorized, the Office of the Attorney General believes that the confidentiality would seem to extend to the agenda for the meeting and the motion to go into closed session. Accordingly, an agenda item denoting an authorized closed session and a motion to go into the session may avoid naming the individual although it is recommended the public body consider naming the individual if the closed session involves a controversy in which there is a strong and legitimate public interest.

However, there is a need to know if a closed session is authorized, and the Office of the Attorney General believes there should be some general description of the subject of the closed session, such as "an employee," "an applicant," "a licensee" or the like. For example, a closed session for an employee should be identified on the agenda and in the motion as a closed session under NRS 241.030(1) to consider the character, alleged misconduct, professional competence, or physical or mental health of an employee.

Remembering that closed sessions are limited to *consideration* of such matters, the confidentiality falls away when the public body is going to take *action* concerning the

subject person. Thus, if action is going to be taken, then the agenda must specify the name of the person.

Part 10 WHAT RECORDS MUST BE KEPT AND MADE AVAILABLE TO THE PUBLIC? (*See* Sample Form 2)

§ 10.01 General

This part discusses the requirements for preparing, preserving, and disclosing minutes of meetings and, if they are taped or recorded, the requirements for preserving and disclosing video or audio tapes of meetings.

§ 10.02 Requirement for and content of written minutes (*See* Sample Form 2)

NRS 241.035 requires that written minutes be kept by all public bodies of each meeting they hold regardless of whether the meeting was open or closed to the public. The minutes must include:

- The date, time, and place of the meeting;
- The names of the members of the public body who were present and the names of those who were absent;
- The substance of all matters proposed, discussed, or decided and, at the request of any member, a record of each member's vote on any matter decided by vote;
- The substance of remarks made by any member of the general public who addresses the body if he or she requests that the minutes reflect his or her remarks, or if he or she has prepared written remarks, a copy of his or her written remarks if he or she submits a copy for inclusion; and
- Any other information that any member of the body requests be included or reflected in the minutes.

See OMLO 98-03 (July 7, 1998) for an example of how a public body may violate the Open Meeting Law by failing to reflect in its meeting minutes the substance of the discussion by the members of the public body of certain relevant matters.

§ 10.03 Retention and disclosure of minutes

Minutes of public meetings are declared by the Open Meeting Law to be public records and must be available for inspection by the public within 30 working days after the meeting is adjourned. *See* OMLO 99-06 (March 19, 1999). In the case of a public body that meets infrequently, formal approval of the minutes of a previous meeting may be delayed several months**.** The unapproved minutes must be made available within the time specified in NRS 241.035(2) to any person who requests them, together with a

written statement that such minutes have not yet been approved and are subject to revision at the next meeting.

The minutes are deemed to have permanent value and must be retained by the public body for at least five years, after which they may be transferred for archival preservation in accordance with NRS 239.080-239.125. Minutes of meetings closed pursuant to NRS 241.030 become public records whenever the public body determines that the matters discussed no longer require confidentiality *and* the person whose character, conduct, competence, or health was discussed has consented to their disclosure.

Under NRS 241.033(3), the subject person is always entitled to a copy of the minutes of the closed session upon request, whether or not they ever become public records. In *Davis v. Churchill County School Board*, 616 F. Supp. 1310, 1314 (D. Nev. 1985), the court suggested that a student who was the subject of closed hearings may release "any information he or she chooses," which presumably includes minutes or tapes of closed sessions.

§ 10.04 Making and retaining audiotapes or video recordings of meetings

It is not a requirement of the Open Meeting Law that meetings be taped. Any meeting of a public body may, at the body's discretion, be recorded on audiotape or any other means of sound or video reproduction. If a meeting is recorded, the recording must be retained by the public body for at least one year, is a public record, and must be made available for inspection by the public during the time the record is retained. NRS 241.035(4).

See OMLO 99-09 (July 28, 1999) for an example of the pitfalls associated with using a tape recorder as the sole source for the record of the meeting.

Recordings of closed sessions made by public bodies must also be retained for at least one year but are given the same protection from public disclosure as minutes of closed sessions set out in NRS 241.035(2). Under NRS 241.033(3), the tapes must be made available to the subject of the closed session, and under NRS 241.035(5), must also be made available to the Office of the Attorney General upon request.

§ 10.05 Fees for inspecting or copying minutes and tapes

The Open Meeting Law requires that minutes and tapes be made available "for inspection" and does not authorize charging a fee. Since fees are not authorized by statute, the Office of the Attorney General believes fees may not be charged for making minutes and tapes available for inspection.

However, if a person wants a copy of the minutes or tapes that are public records, public bodies should consult the open records law or other statutes dealing with fees to determine what, if any, fees may be charged. *See* NRS chapter 239.

As long as minutes and tapes of closed sessions are not public records under NRS chapter 239, the Office of the Attorney General believes that a fee cannot be charged for making copies of them absent specific statutory authority.

§ 10.06 Using court reporters

Some public bodies use court reporters in lieu of audio or visual recordings.

A problem arises in connection with closed sessions. When an audio or visual recording is made of any part of an open session, then all closed sessions must also be so recorded, NRS 235.035(5), and the tape must be made available for inspection to the subject of the closed session at no charge under NRS 241.033(3).

If a public body tape records part of an open session but uses a court reporter in lieu of recording the closed sessions, a violation of the Open Meeting Law may have occurred although it may be only a technical violation considering the reliability of court reporters over tape recorders.

But if the court reporter replaces the tape recorder, who pays for the transcript when the subject wants the record made available to him for inspection under NRS 241.033(3)? Applying a rule of reason, the Office of the Attorney General believes that, if a copy of the written transcript of the proceedings is made available for inspection upon request and without charge, the statute will have been satisfied. If the public body does not want to pay for the cost of transcription, then a tape recording must be made of the closed session as required by NRS 241.035(5).

Part 11 WHAT HAPPENS IF A VIOLATION OCCURS?

§ 11.01 General

When a violation of the Open Meeting Law occurs, the Office of the Attorney General recommends that the public body immediately cure the violation. Although it may not obliterate the violation, corrective action should be taken so that the business of government is accomplished in the open.

The following sections discuss the possible remedies for violations of the Open Meeting Law.

§ 11.02 Containing and correcting violations

Some examples of ways to stop, contain, and correct violations follow. Of course, as circumstances vary, so may the remedies.

- Improper notice given for meeting.

  If proper notice has not been given for a meeting, the meeting must be stopped. *See* OMLO 99-06 (March 19, 1999). To remedy the violation, the Office of the Attorney General believes that the meeting may be convened or continued solely for the purpose of rescheduling a meeting and adjourning. To otherwise continue a meeting after it is discovered the meeting was not properly noticed could be viewed as evidence of a willful violation of the Open Meeting Law. Discussions of any public significance which were held before the discovery of the improper notice should be repeated at a later meeting. All actions taken before adjournment are void but may be taken again at a subsequent meeting as discussed below.

- Discussion of items not clearly on agenda.

  If a public body begins discussion on an item that is not clearly stated on the agenda, it is recommended the public body stop the discussion and schedule it for a future meeting under a more comprehensive agenda. At the subsequent meeting, it would be advisable to summarize or repeat the conversations that occurred at the previous meeting.

- Taking action on items listed as discussion items only.

  Remembering the expanded definition of "action" in NRS 241.051(1), if a public body takes action on an item which has not been identified on the agenda as an action item, the action is void but may be taken up again at a duly noticed meeting where the item is properly listed as an action item on the

agenda. At the subsequent meeting, the rationale for the action should be discussed again or at least the record of the previous meeting made available.

- No proof of service on the subject of a meeting to consider character, alleged misconduct, competence, or health.

  If there is no proof of service of notice on a person whose misconduct, character, professional competence, or mental or physical health is being considered, and the person is not present, the item must be postponed to another meeting, and the subject must be notified again about the new meeting. If the person is present, he or she may be asked if he or she would be willing to waive the notice requirements. The right to notice must be thoroughly explained to the person, and the person should be given the opportunity, free of threat or pressure, to postpone consideration of the matter or to waive the right to notice. As explained in § 6.09 of this manual, any waiver of the right to notice must be knowing and voluntary. A complete record should be made to resolve allegations that may later arise.

However, even though a violation may have been stopped and contained and corrective action taken, the violation may still be the subject of the sanctions below.

§ 11.03 Actions taken in violation are void

The action of any public body taken in violation of any provision of the Open Meeting Law is void, i.e., has no legal force or binding effect. NRS 241.036.

However, lawsuits to obtain a judicial declaration that an action is void must be commenced within 60 days after the offending action occurred. NRS 241.037(3).

It appears that only those actions defined in NRS 241.015(1) are made void by NRS 241.036.

§ 11.04 Rescheduling actions that are void

A public body that takes action in violation of the Open Meeting Law, which action is null and void, is not forever precluded from taking the same action at another legally called meeting. *Valencia v. Cota*, 617 P.2d 63 (Ariz. Ct. App. 1980); *Cooper v. Arizona Western College District Governing Board*, 610 P.2d 465 (Ariz. Ct. App. 1980); *Spokane Education Ass'n v. Barnes*, 517 P.2d 1362 (Wash. 1974). However, mere perfunctory approval at an open meeting of a decision made in an illegally closed meeting does not cure any defect of the earlier meeting or relieve any person from criminal prosecution for the same violation. *Scott v. Bloomfield*, 229 A.2d 667 (N.J. Super. Ct. Law Div. 1967). The matter should be put on an agenda for an open meeting and reheard or discussed. *Cf.* Op. Nev. Att'y Gen. No. 150 (November 8, 1973) regarding the effect of illegal discussions held in a closed meeting on subsequent actions taken, which was written before NRS 241.036 was enacted.

§ 11.05 Any person denied a right under the Open Meeting Law may bring a civil suit

Under NRS 241.037(2), any person denied a right conferred by the Open Meeting Law may bring civil suit:

- To have an action taken by the public body declared void,
- To require compliance with or prevent violations of the Open Meeting Law, or
- To determine the applicability of the law to discussions or decisions of the public body.

Additionally, it may be possible for an aggrieved person to seek injunctive relief as explained in *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974, 976 (1989).

If the plaintiff prevails, the court may award him reasonable attorney's fees and court costs. NRS 241.037(2).

§ 11.06 The Office of the Attorney General may bring a civil suit

The Office of the Attorney General may also bring suit:

- To have an action taken by a public body declared void, or
- For an injunction against any public body or person to require compliance with or prevent violations of the Open Meeting Law. The injunction may issue without proof of actual damage or other irreparable harm sustained by any person.

If an injunction is obtained, it does not relieve any person from criminal prosecution for the same violation. NRS 241.037(1).

§ 11.07 Time limits for bringing lawsuits

Any suit brought to require compliance with the provisions of the Open Meeting Law must be brought within 120 days after the action objected to was taken. NRS 241.037(3).

Any suit brought to have an action declared void must be commenced within 60 days after the action objected to was taken by the public body. NRS 241.037(3). In *Kennedy v. Powell*, 401 So. 2d 453 (La. Ct. App. 1981), the court observed that the Legislature limited suits to challenge actions of public bodies for violation of the Open Meeting Law to a short period of 60 days to ensure a degree of certainty in the actions of public bodies. The 60-day limitation is absolute and is in no way dependent upon knowledge of a

violation. According to the court, running of the 60-day time period destroys the cause of action completely.

§ 11.08 Jurisdiction and venue for suits

A suit may be brought by an aggrieved citizen in the district court in the district in which the public body ordinarily holds its meetings or in which the plaintiff resides. NRS 241.037(1).

A suit brought by the Office of the Attorney General may be brought "in any court of competent jurisdiction." NRS 241.037(1).

However, even though a court has jurisdiction, a defendant may raise objections as to proper venue. *Board of County Commissioners v. Del Papa*, 108 Nev. 170, 825 P.2d 1231 (1992).

§ 11.09 Standards for injunctions and enforcing injunctions

For a discussion of the standards for imposing injunctions and enforcing them, *see City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974 (1989).

§ 11.10 Criminal sanctions

Each member of a public body who attends a meeting of that body where action is taken in violation of any provision of the Open Meeting Law, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor. NRS 241.040(1).

Further, wrongful exclusion of any person or persons from a meeting is a misdemeanor. NRS 241.040(2).

However, a member of a public body who attends a meeting of that public body at which action is taken in violation of the Open Meeting Law is not the accomplice of any other member so attending. NRS 241.040(3).

Upon conviction, punishment may include a jail term of up to six months, a fine not to exceed $1,000, or both.

In Op. Nev. Att'y Gen. No. 81-A (February 23, 1981), the Office of the Attorney General opined there are two requirements before a criminal prosecution may be commenced under the Open Meeting Law. Those requirements are:

> 1. Attendance of a member of a public body at a meeting of that public body *where action is taken* in violation of any provision of the Open Meeting Law. The opinion recognized the distinction in the Open Meeting Law between actions and deliberations and concluded that criminal sanctions may be appropriate when actions are taken in violation of the Open Meeting Law, but where procedural

violations occur involving a meeting where no action is taken, civil remedies are made available to compel compliance or prevent such violations in the future.

2. *Knowledge by a member of a public body* that the meeting is in violation of the Open Meeting Law. The opinion held that, when members of a public body rely on advice of counsel, they should not be held to know that a violation occurred.

While the Open Meeting Law does not require the attorney for the public body to be present at a meeting (AG File No. 00-013 (April 21, 2000)), the presence of the attorney may allow the member to receive advice upon which a member can rely as to whether the member knows that the meeting is in violation of the Open Meeting Law.

§ 11.11 Public officers may be removed from office

Under NRS 283.040(1)(d), a person's office becomes vacant upon a conviction of a violation of NRS 241.040, which is discussed in § 11.10 above.

§ 11.12 Complaints may be made to the Office of the Attorney General

A person whose rights have been denied may seek redress in the courts as explained above. That person may also complain to the Office of the Attorney General but filing a complaint with the Office of the Attorney General does not toll the time periods for the person to take his own action.

Under NRS 241.040(4), the Office of the Attorney General must investigate and prosecute alleged violations of the Open Meeting Law. The Office of the Attorney General believes that any person may file a complaint with the Office of the Attorney General even if that person is not directly aggrieved by the offense.

All such complaints must be in writing, signed by the complaining person, and contain a full description of the facts known to the complainant. The Office of the Attorney General considers all such complaints to be public records and may release them accordingly. Complaints must be sent to:

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

They may be sent by facsimile to (775) 684-1108.

Considering the time limits for bringing lawsuits, it is important that complaints be promptly filed with the Office of the Attorney General to allow sufficient time for investigation and evaluation.

While the complaints themselves are considered public records, investigative files may be held confidential until the investigation is complete and then may become public records, except for records of closed sessions which are obtained as a part of the investigation.

Part 12 HOW IS THE OPEN MEETING LAW INTERPRETED AND APPLIED?

§ 12.01 General

As with any statute, courts use many principles of statutory construction to bring life to the Open Meeting Law and apply it to circumstances before them. Discussing those principles are beyond the scope of this manual, but the Office of the Attorney General has some observations that may be useful in determining how to comply with the Open Meeting Law.

§ 12.02 Legislative declaration and intent

The Legislature declared in NRS 241.010, "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." This spirit was a guiding consideration in several cases. *See McKay v. Board of Supervisors,* 102 Nev. 644, 647, 730 P.2d 438, 441 (1986). *McKay v. Board of County Commissioners*, 103 Nev. 490, 493, 746 P.2d 124, 125 (1987).

§ 12.03 Standards of interpretation

A statute enacted for the public benefit such as a sunshine or public meeting law should be construed liberally in favor of the public, even though it contains a penal provision. *Wolfson v. State*, 344 So. 2d 611 (Fla. Dist. Ct. App. 1977); *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); *Laman v. McCord*, 432 S.W.2d 753 (Ark. 1968). The Open Meeting Law is entitled to a broad interpretation to promote openness in government, while any exceptions thereto should be strictly construed. *McKay v. Board of Supervisors,* 102 Nev. 644, 730 P.2d 438 (1986)*; Wexford County Prosecuting Attorney v. Pranger*, 268 N.W.2d 344 (Mich. Ct. App. 1978). A construction which frustrates all evasive devices is preferred for an open meeting law. *Florida Parole & Probation Commission v. Thomas*, 364 So.2d 480 (Fla. Dist. Ct. App. 1978). *See also* Op. Nev. Att'y Gen. No. 85-19 (December 17, 1985).

§ 12.04 Use of standard of reasonableness

In circumstances where the Open Meeting Law provides no clear standards or guidelines, public bodies must consider themselves as being governed by a standard of reasonableness. *See* Op. Nev. Att'y Gen. No. 79-8 (March 26, 1979).

§ 12.05 Attorney General opinions

While Attorney General opinions are intended to be helpful in fashioning compliance with the Open Meeting Law, they are not binding on the courts even though the Office of the Attorney General is given the duty of investigating and prosecuting Open Meeting

Law complaints. *See Tahoe Regional Planning Agency v. McKay*, 590 F. Supp. 1071, 1074 (D. Nev. 1984), *aff'd* in *Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534, 539 (9th Cir. 1985).

In addition, the Office of the Attorney General has a long-standing policy of reserving opinions regarding Open Meeting Law complaints that are in litigation even though NRS 241.040(4) gives the Office of the Attorney General investigative and prosecutorial powers. *See* OMLO 98-05 (September 21, 1998).

Part 13 WHAT ELSE DO I NEED TO KNOW ABOUT THE OPEN MEETING LAW?

§ 13.01 General

This part covers special questions or topics not discussed elsewhere in this manual.

§ 13.02 Relationship of Open Meeting Law to Administrative Procedures Act, NRS chapter 233B

The Nevada Administrative Procedure Act (APA), chapter 233B of NRS, requires some agencies to give notice and conduct public hearings before adopting rules and regulations.

If the agency is a "public body" (*see* Part 3 of this manual), both the Open Meeting Law and the APA will apply, and it will be necessary to coordinate the proceedings. The Office of the Attorney General recommends the APA notice be prepared and distributed as required by the APA, that a meeting of the public body be noticed and put on the agenda under the Open Meeting Law, and the hearings be included as an action item on the agenda.

The APA also governs the hearings of "contested cases" before administrative agencies and, again, if the agency is a "public body," the Open Meeting Law will also apply to the hearings. The specific statute governing the activities of the agency may have to be considered as well.

If the Open Meeting Law applies to a contested case hearing, a question arises whether a closed session may be held. Absent a specific statute to the contrary, the contested case must be heard in an open meeting context, and the public body may go into closed session under NRS 241.030 only to consider the character, alleged misconduct, professional competence, or mental or physical health of a person, as discussed in Part 9 of this manual. *See* Op. Nev. Att'y Gen. No. 81-C (June 25, 1981). If the public body is going to conduct a closed session under NRS 241.030(1), the notice requirements of NRS 241.033(1) must be met. If the notice of hearing prepared under NRS chapter 233B or other relevant statute provides for timing and notice requirements equivalent to NRS 241.033(1), the notices may be coordinated.

SAMPLE FORM 1: Notice And Agenda Of Public Meeting (With Comments)

Comments	**Sample Form**
***See* Parts 6 and 7** of the NEVADA OPEN MEETING LAW MANUAL, Eighth Edition, February 2000, for details.	(This is only a sample. Other formats may be used.)
	NOTICE OF PUBLIC MEETING of the
Name of public body	**COMMISSION FOR OPEN GOVERNMENT**
Must state the time, place, and location of meeting.	The Commission for Open Government will conduct a public meeting on November 14, 1997, beginning at 9 a.m. at the following locations:
This shows how a meeting to be held at multiple locations may be noticed. Sites should be connected by speaker phone or other device where all persons at all locations may hear all persons at all other locations.	at its principal office at 1801 North Carson Street, Suite 104, Carson City, Nevada and at its Las Vegas office in the Grant Sawyer Building, 2501 Washington Street, Las Vegas, Nevada, Suite 401. The sites will be connected by speaker telephones. The public is invited to attend at either location.
If items may be taken out of order, it is recommended (but not required) to so state.	Below is an agenda of all items scheduled to be considered. Unless otherwise stated, items may be taken out of the order presented on the agenda at the discretion of the chairperson.
See NRS 241.020(1). Giving the name and telephone number of a contact person is not required, but may avoid time delays or embarrassment.	Reasonable efforts will be made to assist and accommodate physically handicapped persons desiring to attend the meeting. Please call Doris Jones at (702) 322-1234 in advance so that arrangements may be conveniently made.
Reasonable rules may be imposed on public comment. It is recommended (but not required) to announce such rules in advance.	Public comment may be limited to ten minutes per person at the discretion of the chairperson.

AGENDA

Agenda must consist of a clear and complete statement of the topics scheduled to be considered during the meeting.

(Action may be taken on those items denoted "Action")

Agenda must include a list describing the items on which action may be taken and clearly denote that action may be taken on those items. There are other ways to denote action items. Some bodies use an asterisk by the item number, others put action items as a special item on the agenda. It is not recommended to merely state that action may be taken on any item on the agenda.

1. Call to Order and Roll Call. (Action)

2. Approval of minutes of previous meeting. (Action)

3. Report by Committee on Abuse of Open Meeting Laws. (Discussion)

See Part 9 of the Nevada Open Meeting Law Manual for discussion of when closed sessions are authorized and how they are to be handled. This is a sample format for those limited situations discussed in § 9.07 where no action will be taken.

4. Closed session to discuss the character, alleged misconduct, professional competence of a staff employee of the Commission. (Discussion)

No action may be taken in a closed session. These are examples of how to notice an item where the public body may go into closed session. Okay to list only the attributes before taking action in open session (i.e., character, professional competence, health, etc.) that will be considered.

5. Performance Evaluation of Sue Smith. (Action) (Closed session may be held to consider character, alleged misconduct, professional competence, physical or mental health.)

If action is to be taken, it must be in an open session, and the names of the subject persons should be listed.

6. Disciplinary Hearings regarding complaints for violation of open meeting laws. (Action)

   a. Sam Smith
   b. Harry Brown

Don't forget to notify the subject persons per NRS 241.033. When licenses, grants, or permits are to be awarded, names should be included. If there are too many names to put on an agenda, a separate list may be used as shown below.

7. Licenses and permits to operate as open meeting specialists. (Action)

   a. Peter Smith
   b. John Doe

Where there are too many expenditures to list on the agenda as a practical matter, or all of the items have not yet been prepared, a separate list may be used, but the list or materials must be made available upon request under NRS 241.020(4).

8. Approval of Expenditures by Commission. (Action) List and vouchers available at principal office of the Commission.

If there are topics of known public interest upon which the public body may deliberate, it should be identified. If action might be taken (including approving of a report), this should be listed as an action item and must contain a description of the items on which action will be taken.

9. Report by Executive Officer (Discussion) including:

   a. Salary of executive director
   b. Legislative audit of Division

This item is mandatory under NRS 241.020(2)(c)(3).

10. Public comments and discussion. (Discussion) No action may be taken on a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action will be taken.

11. Adjournment. (Action)

Must be posted not later than 9 a.m. on the third working day before the meeting. Do not count the day of the meeting as one of the three working days.

This notice and agenda has been posted on or before 9 a.m. on the third working day before the meeting at the following locations:

Must be posted at the principal office of the public body, or if it has no principal office, then at the building where the meeting will be held, and at least three other separate, prominent places within the jurisdiction of the public body.	(1) The Commission's principal office at 1801 North Carson Street, Suite 104, Carson City, Nevada (2) Grant Sawyer Building, 2501 Washington Street, Las Vegas, Nevada (3) Las Vegas City Hall, 1401 Main Street, Las Vegas, Nevada (4) Reno City Hall, 490 South Center Street, Reno, Nevada

SAMPLE FORM 2: Minutes

Other formats or styles may be used. This is not intended to be a complete set of minutes, only to show how certain matters listed on Sample Form 1 might be handled in the minutes in order to comply with the Open Meeting Law. The public body must take into account other statutory, procedural, or record keeping requirements.

MINUTES

of the meeting of the

COMMISSION FOR OPEN GOVERNMENT

November 14, 1997

The Commission for Open Government held a public meeting on November 14, 1997, beginning at 9 a.m. at the following locations:

> at its principal office at 1801 North Carson Street, Suite 104, Carson City, Nevada and at its Las Vegas office in the Grant Sawyer Building, 2501 Washington Street, Suite 401, Las Vegas, Nevada.

The sites were connected by speaker telephones.[1]

1. Call to order, roll call

The meeting was called to order by Chairman Shirley Brown. Present were commissioners Harry Smith, Peter Knowitall, Roger Dodger, Mike Brown, and Sue Doe. Absent was Commissioner Henry.

Also present were Executive Director Sue Smith and various staff members of the commission. Members of the public were asked to sign in, and the sign in sheet is attached to the original minutes as Exhibit A.

2. Approval of minutes of previous meeting

The minutes of the October 10 meeting were approved with changes.[2]

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[1] The date, time, and place of meeting as well as the members of the public body who were present and absent, is required. NRS 241.035(1). Listing others present is not required by the Open Meeting Law but may be helpful in resolving Open Meeting Law and other complaints regarding the proceeding.

[2] If requested by a member, the minutes must record each member's vote. NRS 241.035(1)(c). Otherwise, for Open Meeting Law purposes, a matter like this may be handled this way. For other purposes, it may be advisable to give details about who made and seconded motions and how votes were cast. Consult with counsel.

3. Report by the Committee on Abuse of Open Meeting Laws

Mr. Rodgers reported that the Committee had completed its report on abuse of Open Meeting Laws. A copy of the report is attached to the original minutes as Exhibit B.

Commissioner Dodger asked about the incident involving Mayor Smith in Little Town on August 17 and wanted the Commission to file litigation. He was reminded that the report was listed on the agenda as a discussion item, and action may not be taken. Further, Mayor Smith would have to be notified if the Commission was going to discuss his misconduct.

Commissioner Knowitall thanked the Committee for its fine work.[3]

4. Closed session to discuss the character, alleged misconduct, and professional competence of a staff employee of the Commission

On motion by Commissioner Dodger, seconded by Commissioner Brown, and approved with a unanimous vote, a closed session was conducted to discuss the character, alleged misconduct, and professional competence of a staff employee of the Commission. The Commission received proof that the employee was notified as required by law. Separate minutes of the session have been prepared.[4] No action was taken.

5. Performance Evaluation of Sue Smith

The Commission received proof that Mrs. Smith was notified as required by law.[5]

Mrs. Smith objected to comments regarding her professional competence indicating that she was new on the job and shouldn't be held to the standards of an experienced employee.

A member of the public addressed the Commission and asked that her remarks be included in the record. A copy of her remarks is attached to the original of these minutes as Exhibit C.[6]

On motion by Commissioner Dodger, seconded by Commissioner Brown, and approved with a unanimous vote, the evaluation attached to the original of these minutes as Exhibit D was approved.

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[3] The substance of the discussion must be reported. NRS 241.035(1)(c).

[4] The minutes should reflect that all the procedural requirements and limitations of a closed session have been followed. *See* § 9 for a discussion.

[5] The agenda suggested that the Commission may go into closed session, but in this instance, it handled the whole matter in an open session. Even if it does so in an open meeting, the Commission must still receive proof of service required by NRS 241.033(1).

[6] *See* NRS 241.035(1)(d). If the commentator does not have written remarks, then his or her oral remarks must be reflected.

6. Disciplinary Hearing re Harry Brown

A disciplinary hearing was held regarding alleged misconduct of Harry Brown. Opening remarks were made by Deputy Attorney General Joe Smith and by counsel for Mr. Brown, Gerry Spence.

Six witnesses testified and were cross-examined. Fifteen exhibits were received into evidence. A record of the proceeding was made by a court reporter and a transcript is available.[7]

On motion by Commissioner Dodger, seconded by Commissioner Brown, and approved with a unanimous vote, a closed session was conducted to discuss the character, alleged misconduct, and professional competence of Mr. Brown. The Commission received proof that the employee was notified as required by law. Separate minutes of the session have been prepared.

Following the closed session, the Commission went back into open session to take action. On motion by Commissioner Dodger, seconded by Commissioner Doe, and upon a vote of 4-2, the Commission found that Mr. Brown had violated various provisions of the Open Meeting Law as alleged in the complaint. Mr. Brown was ordered to pay a $1,000 fine. Counsel for the Commission was instructed to prepare Findings of Fact, Conclusions of Law, and Order to be approved and signed by Chairman Brown, and it will be filed with the original of these minutes.

7. Public Comments and Discussion

Mrs. Henrietta Cobb addressed the Commission, indicating there is a serious flaw in the Open Meeting Law regarding serial communications, and asked the Commission to propose legislation to plug up the gap. She gave an example of Brown County, where the County Manager approved a contract with Henry's Construction Company after discussing it with each Commissioner one at a time. At the meeting, the County Commission voted to ratify the contract without any discussion or input from the community. Commissioner Brown said he would consider having the matter put on an agenda for a future meeting, and Mrs. Cobb would be invited to participate.

Commissioner Dodge presented to the Commission a report by the Greenpeace organization regarding the massacre of thousands of people in Uganda. He commented that something should be done about it and asked that the report and his remarks be included in the record of this meeting. The report is attached to these minutes but was not read by other Commissioners, and there was no discussion about his remarks.[8]

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[7] More detail may be required by the law that governs hearings by the body. For Open Meeting Law purposes, this shows what happened in the open and closed sessions and that a separate record has been made.

[8] Any other information that is requested to be included or reflected in the minutes by any member of the body must be included, even if not relevant or discussed. NRS 241.035(1)(e).

SAMPLE FORM 3: Notice of Intent to Consider Character, Misconduct, Competence or Health of a Person. NRS 241.033

COMMISSION FOR OPEN GOVERNMENT
1801 North Carson Street, Suite 104
Carson City, Nevada 89701

December 10, 1997

Ms. Sue Smith
1102 Center Street
Reno, Nevada 89504

Re: Notice of meeting of the Commission to consider your character, alleged misconduct, competence, or health.

Dear Ms. Smith:

In connection with your performance evaluation, the Commission may be considering your character, alleged misconduct, competence or health at its meeting on January 14, 1998.[1] The meeting will begin at 9 a.m. at 1801 North Carson Street, Suite 104, in Carson City, Nevada. The meeting is a public meeting, and you are welcome to attend. The Commission may go into closed session to discuss your evaluation but will return to an open meeting to take action.[2] You are welcome to attend the closed session.[3]

This notice is provided to you under NRS 241.033.[4]

Very truly yours,

_____
Commission Secretary

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[1] If requested by a member, the minutes must record each member's vote. NRS 241.035(1)(c). Otherwise, for Open Meeting Law purposes, a matter like this may be handled this way. For other purposes. it may be advisable to give details about who made and seconded motions and how votes were cast. Consult with counsel.

[2] The substance of the discussion must be reported. NRS 241.035(1)(c).

[3] The minutes should reflect that all the procedural requirements and limitations of a closed session have been followed. ***See* § 9 for a discussion.**

[4] *See* NRS 241.035(1)(d). If the commentator does not have written remarks, then his or her oral remarks must be reflected.

PROOF OF SERVICE

I, _____, hereby swear or affirm under penalty of perjury, that in accordance with NRS 241.033, I served the foregoing Notice of Meeting of the Commission to consider character, alleged misconduct, competence, or health

_____ By personally serving it on Sue Smith at _____

_____ By depositing it in the United States Mail, postage prepaid, certified mail # addressed to Sue Smith at _____ on this _____ _____ day of _____, 1997.

_____
Signature of person making service

State of Nevada)
ss:
_____ County)

Signed and sworn to (or affirmed) before me by _____
(name)
on _____.
(date)

_____
Notary Public

----------Notes----------

This is only a sample format. Other formats, styles, or preprinted forms may be used as long as they contain all the information required by NRS 241.033.

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